

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Dr.T.Prabhakara Rao

.... Member

and

Thiru.K.Venkatasamy

.... Member (Legal)

I.A.Nos. 3 and 5 of 2019

in

D.R.P. No.6 of 2019

and

D.R.P. No.6 of 2019

M/s. Corolla Green Power Private Limited
Having registered office at
Fourth Floor, Caledon Square
Avinashi Road
Peelamedu
Coimbatore - 641 004
Rep. by its Authorised Signatory
Mr.B.Rajeswaran

... Petitioner
(Thiru.N.L. Rajah, Senior Advocate
for Thiru.Aravindan, Advocate
representing M/s. Fox Mandal
Associates)

Vs

1. Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002

2. The Director / Generation
Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
No.144, Anna Salai
Chennai – 600 002.

3. The Chief Engineer
Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
144, Anna Salai
Chennai – 600 002.
4. The Superintending Engineer
Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
Udumalpet, Eripalayam
Tiruppur Road, Udumalpet – 642 126.

....Respondents
(Thiru S.R. Rajagopal, Additional
Advocate General for
Thiru.M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 09-08-2019; 27-08-2019; 05-09-2019;
17-09-2019; 24-09-2019; 15-10-2019;
22-10-2019; 10-12-2019; 28-01-2020;
25-02-2020; 14-07-2020; 21-07-2020;
28-07-2020; 18-08-2020; 01-09-2020;
02-09-2020; 25-09-2020 and 29-09-2020

Date of order : 27-10-2020

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The D.R.P.No.6 of 2019 came up for final hearing before the Commission on 29-09-2020 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

ORDER

1. Prayer in D.R.P. No. 6 of 2019:-

The prayer of the petitioner in this D.R.P.No.6 of 2019 is to direct the Respondent to provide the evacuation facility / infrastructure as undertaken by them to the petitioner under the provisions of the Energy Purchase Agreement

dated 16-10-2017 and / or request for submission document bearing reference number CE/NCES/O.T. No.2/2017-18 and / or in its response to the pre-bid queries raised by the prospective bidders; and consequentially to extend the commissioning date of the project for the period of delay caused by the 1st Respondent until completion of the same in providing evacuation facility to the petitioner.

2. Affidavit dated 27-08-2019 filed by the Petitioner:-

Based on the daily orders of the Commission on 09-08-2009, the petitioner had to deposit the alleged deficit court fees within one week from the date of the said order. The petitioner has paid the court fee of Rs.25,00,000/- under protest as required by the Registry of this Commission by way of Demand Draft No. 852015000019000 drawn on the Indian Bank.

3. Prayer of the Petitioner in I.A. No.3 of 2019 in D.R.P. No.6 of 2019:-

The prayer of the Petitioner in I.A. No.3 of 2019 in D.R.P. No.6 of 2019 is to seek a refund of the excess court fee claimed by the Registry to the tune of Rs.25,00,000/- paid by the petitioner under protest.

4. Prayer of the Petitioner in I.A. No.5 of 2019 in D.R.P. No.6 of 2019:-

The prayer of the Petitioner in I.A. No.5 of 2019 in D.R.P. No.6 of 2019 is to grant an order of interim-injunction restraining the Respondent, its men, agents or affiliates from invoking and / or encashing the Performance Bank Guarantee dated 12-10-2017 (Bank Guarantee No. 0753617BG0000139) for an amount of INR

25,00,00,000/- (Indian Rupees Twenty Five Crores only) issued on behalf of the Petitioner to the Respondent and / or from levying any liquidated damages under clause 16 (b) of the Energy Purchase Agreement dated 16-10-2017 pending disposal of the main petition.

5. Facts of the Case:-

The petition has been filed seeking extension of time for date of commissioning of the project on account of reasons beyond the control of the petitioner primarily attributable to TANGEDCO's inability to provide / complete the evacuation facility / infrastructure to the petitioner as undertaken by the TANGEDCO under the terms of the EPA and Rfs.

6. Contentions of the Petitioner:-

6.1 The petitioner approached the Hon'ble High Court, Madras by way of Writ Petition in W.P. No.14548 and 14550 of 2019 seeking the following reliefs:-

W.P. No. 14548 of 2019:

"To issue a writ of certiorari, to call for the records pertaining to Lr.No. DIR/Gen/CE/NCES/SE/Solar/EE/WPP/AEE2/F.M/s.Corolla Green Power Pvt. Ltd./D.30/19, dated 09-01-2019 issued to the petitioner by the Director / Generation of the Respondent without any jurisdiction and quash the same".

W.P. No.14550 of 2019:

"To issue a writ of declaration, declaring that the commissioning date of the 250 MW project under the Energy Purchase Agreement dated 16-10-2017 between the petitioner and the respondent is extended for the period of delay caused by the

Respondent in providing the bays at the 400/230-110 KV Rasipalayam Sub-station to the Petitioner until allocation.

In the said writ petitions, the following interim reliefs were also sought:-

- a. To pass an order of interim injunction restraining the Respondent from levying any liquidated damages under clause 16(b) of the Energy Purchase agreement dated 16.10.2017 as stated in the letter bearing Lr. No.DIR/Gen/CE/NCES/SE/Solar/EE/WPP/AEE2/F.M/s.Corolla Green Power Pvt.Ltd./D.30/19, dated 09.01.2019 issued by the Director/ Generation to the Petitioner;
- b. To pass an order of interim injunction restraining the Respondent from invoking and/or encashing the Performance Bank Guarantee dated 12.10.2017 (No. 0753617BG0000139) for an amount of INR 25,00,00,000 valid upto 20.10.2019 issued on behalf of the Petitioner to the Respondent;

6.2. The Hon'ble High Court vide order dated 26.06.2019 was pleased to dispose off the above said Writ Petitions by directing the Petitioner herein to approach this Commission within 3 weeks from the date of its constitution and seek redressal of his grievance and until then the 1st Respondent was restrained from exercising the right of encashing the performance bank guarantee given by the Petitioner. Further, the Hon'ble High Court was pleased to restrain the 1st Respondent herein from taking any coercive action for three weeks from the date of constitution of this Commission.

6.3. In compliance with the aforesaid order, the Petitioner has now preferred the present D.R.P.

6.4. The 1st Respondent invited bids to establish, maintain and operate wind power plants of 500 MW in the State of Tamil Nadu at the rate to be finalized through reverse bidding, considering the fixed tariff ceiling of INR 3.46 (Indian Rupees Three and Paise Forty Six) per unit as the upper limit. It is pertinent to state that the Petitioner was the lowest bidder and other bidders were asked to match the price offered by this Petitioner thereby ensuring success of the bid for the entire 500 MW capacity approved by this Commission. Tender specifications through Request for Submission document No.CE/NCES/O.T.No.2/2017-18 ("RfS") was issued for this purpose.

6.5. The Petitioner's parent company—M/s.Leap Green Energy Pvt. Ltd. ("Leap Green"), submitted its bid to sell the generated wind power to the 1st Respondent at the rate of INR 3.43 (Indian Rupees Three and Paise Forty Two) per unit. It is pertinent to state that the Petitioner was the lowest bidder and other bidders were asked to match the price offered by this Petitioner, thereby ensuring success of the bid for the entire 500 MW capacity approved by this Commission.

6.6. The 1st Respondent selected Leap Green as one of the successful bidders. The 1st Respondent agreed to purchase the wind power at the rate of INR 3.42 (Indian Rupees Three and Paise Forty Two) per unit and issued a Letter of Intent vide Lr.No.CE/NCES/SE/SOLAR/EE/WPP/ AEE2/F.M/s.Leap Green Energy Pvt.

Ltd. D.2068/17 dated 21.09.2017 ("Lol") on the terms and conditions specified under the Tender. By way of letter dated 03.01.2017 to the 1st Respondent, Leap Green communicated that a special purpose vehicle (a 100% owned subsidiary) by the name of Corolla Green Energy Pvt. Ltd. (the Petitioner herein) had been formed to undertake the Project in line with the terms of the RfS. It is pertinent to note that even though Respondent had invited bids for 500 MW, the Petitioner's parent company was conscious of its ability and capability to undertake the Project and applied for 250 MW only, which it was granted.

6.7. The petitioner and the 1st Respondent executed an Energy Purchase Agreement on 16.10.2017 ("EPA") for establishment of the 250 MW wind power project ("Project") at Parivillikottai Village, Ottapidaram Taluk, Turicorin District. An Addendum to the EPA dated 04.12.2017 ("Addendum to EPA") was executed to change the location of the Project to Koothampoondi area, Ottanchatram Taluk, Dindugal District due to constraints in purchase of land and right of way issues.

6.8. The petitioner submitted a Performance Bank Guarantee dated 12-10-2017 (No. 0753617BG0000139) for an amount of INR 25,00,00,000 (Indian Rupees Twenty Five Crores only) valid upto 20-10-2019 ("PBG") at the rate of INR 10,00,000 per MW as per clause 14 of the RfS. The PBG was submitted as a security against commissioning of the Project within 15 months of date of signing of the EPA, i.e. 15.01.2019. In case of failure to achieve the same, it was stated that the Respondent may be entitled to encash the PBG. Clause 26(b) of the RfS stated that if the commissioning of the Project is delayed beyond 5 (five) months, the

1st Respondent may encash the PBG on per day basis proportionate to the capacity not commissioned and in case the commissioning of the Project is delayed beyond 5 months thereafter, the 1st Respondent may be entitled to encash 100% of the PBG. In addition to such encashment, the Petitioner may also have to pay a sum of INR 10,000/- (Indian Rupees Ten Thousand only) per MW per day of delay as liquidated damages for the delay in such remaining capacity which is not commissioned.

6.9. The Clause 26(b) of the EPA further provides that the maximum time period allowed for commissioning of the full Project capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be ten months from the scheduled date of commissioning, i.e., 15-11-2019. The amount of liquidated damages worked out as above may be recovered by the 1st Respondent from the payments due to the Petitioner on account of sale of the power generated to the 1st Respondent. In case, the commissioning of the Project is delayed beyond 10 months from the scheduled date of commissioning, the EPA capacity shall stand reduced / amended to the Project capacity commissioned and the EPA for the balance capacity will stand terminated and shall be reduced from the selected Project capacity. If the Project was not commissioned beyond 10 months from the scheduled date of commissioning, the EPA will be terminated.

6.10. Since the Project location was changed due to issues arising out of procurement of land and right of way issues, submission of the Detailed Project Report and land details for the proposed substation were delayed. The Petitioner

requested extension of time to submit the same via letters dated 20.12.2017 and 09.02.2018 and the 1st Respondent resultantly extended the time for submission of the documents until 30.04.2018 by way of its letters dated 06.01.2018 and 21.02.2018.

6.11. The Petitioner had also requested a change in the power transformer configuration system by way of its letter dated 09-02-2018 since the Petitioner along with its Original Equipment Manufacturer ("OEM") had planned to establish a Pooling Substation with two 125 MVA transformers whereas the load flow reports provided by the 1st Respondent mentioned two 100 MVA transformers and one 50 MVA transformer. The 1st Respondent declined the request by way of its letter dated 14-03-2018 stating the reasons for the infeasibility of the same.

6.12. The above mentioned issues in finalizing the Pooling Substation and further the problems in finalizing the shortest route for the 230 kV EHV lines, the petitioner faced delays in finalizing and registering the land for the pooling substation. Therefore, the Petitioner was constrained to approach the 1st Respondent by way of communication dated 20-04-2018 praying for extension of time to submit a copy of the registered sale deed / lease deed for the proposed substation land. The 1st Respondent by way of its reply dated 25-04-2018 granted extension until 31-05-2018 for the same. In compliance with the time granted, the Petitioner submitted the registered lease deed for establishment of the Pooling Substation along with communication stating the same on 28.05.2018.

6.13. The 1st Respondent had communicated to the Petitioner via letter dated 25.11.2017 that the load flow tests were completed and that the Project can be interfaced with the 400/230-110 kV Substation at Rasipalayam. The Petitioner, therefore, was required to build a Pooling Substation to receive the power generated by the WTGs by way of the 33 kV lines which would then be evacuated through the 230 kV lines to the Rasipalayam 400 kV Substation built and owned by the 1st Respondent.

6.14. During the discussions conducted between the Petitioner and the 1st Respondent, it was decided that one bay in the Rasipalayam Substation would be granted to the Petitioner but no technical feasibility report in respect of the same has been provided by the 1st Respondent.

6.15. The petitioner was required to deposit the amount required for establishing the bay(s). This was communicated to the Petitioner by the 1st Respondent by way of letter dated 18.09.2018, which communication stated that for connecting the Petitioner's 230/33 kV Substation with the 230 kV side of the Rasipalayam 400 kV Substation and for reserving two 230 kV bays, the Petitioner will be required to make payment of tentative bay cost of INR 6,74,29,800 (Rupees Six Crores Seventy Four Lakhs Twenty Nine Thousand Eight Hundred only) (at INR 3,37,14,900 per bay) within 30 (thirty) days of receipt of the communication or the Petitioner may choose to construct the bays at its own cost at the Rasipalayam 400/230 kV substation with payment of tentative establishment and supervision

charges of INR 1,86,00,000 (Rupees One Crore Eighty Six Lakhs only) (at INR 93,00,000 per bay).

6.16. The petitioner has communicated its willingness to make payment, in respect of the same by way of communication dated 16-10-2018. Despite the same, the petitioner has neither received any confirmation regarding the construction of the bays, nor has any confirmation regarding the final cost for establishing the required bay (one number) for the project or demand note in respect of the same been provided. But the petitioner noticed that no additional space available for accommodating two more 230 kV bays to be used by the petitioner. This led the petitioner to believe that the required 400/230 kV bay for evacuation of power in the Rasipalayam Substation has not been allocated to the petitioner. Since no power evacuation can occur even if the project is established, development of a project which involves significant investment of thousands of crores has become unfeasible for the petitioner.

6.17. Despite being well aware that there is no space available to accommodate two additional bays near 400/230-110 kV Rasipalayam substation, the 1st Respondent has been demanding payment of bay construction / supervision charges from the petitioner.

6.18. It is the obligation of the 1st Respondent to ensure evacuation of power from the generating station to the load dispatch centre(s).

6.19. It is the duty of the 1st Respondent, both statutorily and contractually, to have ensured allocation of bays at the 400/230-110 kV Rasipalayam Substation to evacuate power. Further, the 1st Respondent, in response to a wind power developers' queries in respect of the RfS, has stated in the Reply to the Pre-Bid queries that "the evacuation will be made available in time" and only on that assurance deemed generation was foregone by the wind power developers. Thus, the 1st Respondent has admitted to and accepted its responsibility to make evacuation facilities available. Due to the unavailability of bays at the 400/230-110 kV Rasipalayam Substation, the Petitioner was left without any measures to receive funds from its lenders and consequently to evacuate the power that its Project would generate within the time agreed under the EPA.

6.20. The 1st Respondent has struggled to complete its obligations and to make payments in lieu of the energy generated by other commissioned projects. The 1st Respondent never established a revolving Letter of Credit which is envisaged under the respective energy purchase agreements and the terms and conditions of the tender placed by the 1st Respondent. The lack of forthcoming payment from the 1st Respondent has demonstrated that the 1st Respondent has been reneging in its obligations and there is no assurance that the Petitioner will receive the money due to it if the Project is developed and commissioned.

6.21. The Petitioner has therefore requested the 1st Respondent to extend the Commissioning date and waive the liquidated damages payable by the Petitioner

by way of communications dated 25.09.2018 and 18.12.2018. The Petitioner is willing and ready to develop the Project.

6.22. In light of the 1st Respondent's failure to fulfil its contractual and statutory obligations, the Petitioner is entitled to receive the extension of commissioning of the Project. Instead, the 1st Respondent has issued the communication dated 09.01.2019 to the Petitioner stating arbitrarily, unreasonably and illogically that such extension is not viable and since the Project was not commissioned by 16.01.2019, it is at liberty to act as per the provisions of the RfS and further levy liquidated damages for the un-commissioned capacity.

6.23. The first Respondent issued a communication bearing No.DIR/Gen/CE/NCES/SE/Solar/EE/WPP/AEE2/F.M/s. Corolla Green Power Pvt. Ltd./D.30/19, dated 09.01.2019 whereby indicated to invoke the performance bank guarantee issued by the Petitioner and further stated that the 1st Respondent will levy liquidated damages as per clause 16(b) of the EPA. Since the 1st Respondent refused to address the same, it is a dispute between the parties to the EPA that must be resolved in accordance with section 86(1)(f) the Act by this Commission.

7. Contention of the Respondent in the I.A. No.5 of 2019:-

In the counter affidavit filed on 24-09-2019, the Respondent has submitted as follows:-

7.1. TANGEDCO proposed to procure wind power from private developers within the State of Tamil Nadu through reverse e-bidding process as detailed below:

- (i) To achieve the nationwide target of 175 GW of Renewable Energy (RE) Power by 2020 of which 60 GW for Wind Power fixed by Ministry of Power, Government of India.
- (ii) To comply the 9% Non-Solar Renewable Power Obligation (RPO) fixed by Tamil Nadu Electricity Regulatory Commission (TNERC) issued vide Notification No.TNERC/RPO/19-4, dated 07.03.2016.
- (iii) Initially, the Hon'ble TNERC vide its order dated 02.06.2017 in M.P. No.10 of 2017 gave the in-principle approval for proceeding with the Tender as per the draft guidelines issued by Ministry of New and Renewable Energy (MNRE) vide notification F.No.66/183/ 2016-WE, dated 22.10.2016.

7.2. Clause 26.0 of the tender specification approved by the Commission stipulates:

“26.0 Commissioning:

(a) Part Commissioning:

Part commissioning shall be accepted for the total 50% bidden capacity. Part commissioning will not be applicable to projects having capacity of 10 MW or less.

(b) Commissioning Schedule and Liquidated Damages for Delay in Commissioning:

The Wind power Project shall be commissioned within 15 months from the date of signing of Energy Purchase Agreement. In case of failure to achieve this milestone, TANGEDCO shall encash the Performance Guarantee in the following manner:

Delay up to Five months:

TANGEDCO will encash the Performance Bank Guarantee on per day basis and proportionate to the Capacity not commissioned, with 100% encashment for 5 months' delay beyond stipulated commissioning period of 15 months.

Delay beyond five months:

In case the commissioning of project is delayed beyond 5 months, the WPG shall, in addition to 100% encashment of Bank Guarantee, shall pay TANGEDCO a sum of Rs.10,000/- per MW per day of delay for the delay in such remaining capacity which is not commissioned.”

7.3. The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 10 months from the scheduled date of commissioning. The amount of Liquidated Damages worked out as above shall be recovered by TANGEDCO from the payments due of the Project Developer on account of Sale of Wind Power to TANGEDCO. In case, the Commissioning of the Project is delayed beyond 10 months from the scheduled date of commissioning, the EPA capacity shall stand reduced / amended to the Project Capacity Commissioned and the EPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity. Also, if the project is not commissioned beyond 10 months from the scheduled date of commissioning, the EPA will be terminated.”

7.3. Knowing fully well of the commissioning schedule, the petitioner participated in the tender and the Letter of Intent (LoI) dated 21.09.2017 was issued. The petitioner and the SPV formed by M/s. Leap Green Energy Pvt. Ltd. signed the Power Purchase Agreement (herein referred to as PPA) with the respondents on 16.10.2017. It is pertinent to state that even in the PPA, the commissioning schedule and subsequent Liquidated Damages (herein referred to as LD) for delay in commissioning the project has been clearly stipulated in clause 16.0 of the PPA.

7.4. As per clause 16 of PPA, the project commissioning schedule is as follows:

- a. Date of signing of PPA with the respondent : 16-10-2017
- b. Schedule date of commissioning as per PPA is
15 months from the date of signing of PPA : 15-01-2019
- c. Last date for commissioning the project with
1st 5 months extension with encashment of
Performance Guarantee worth Rs.25 crores
as Liquidated damages by TANGEDCO : 15-06-2019
- d. Last date for commissioning the project with
2nd 5 months time extension on payment of
liquidated damage of Rs.10,000/ MW/ Day
totaling to Rs.37.5 crores by way of producing
PBG in advance : 15-11-2019

The said P.P.A. is valid upto 15-11-2019 with the above conditions.

7.5. The whole tender process took place after due approval of the Commission at every stage. Being so, there exists no dispute with regard to the commissioning schedule and the LD, which were accepted by the petitioner.

7.6. From a reading of the various communications exchanged between parties filed in the present dispute, it is pertinent to state the respondents have in fact been accommodative and have given extension of time as and when required by the petitioner. Taking advantage of the same, the petitioner has now come forward with the above DRP seeking further extension of time for date of commissioning of the project when the petitioner has not even laid a brick in place. Moreover, the Commission in plethora of orders more particularly in M.P. No.42 of 2008 dated 28-11-2008 took cognizance of the fact that wind energy generators require just three to six months to install their capacity unlike the thermal generation plants that take three to four years to mature. In the present case, despite agreeing for commissioning of the project within 15 months, i.e. by 16.01.2019, the petitioner has still not performed his part of the agreement and has come forward with the above DRP for further extension of time in commissioning the project.

7.7. If the petitioner does not commission the project within the commissioning period of 15 months from the date of the signing of PPA, the PPA itself grants 5 month's time extension with LD of Rs.10 lakhs/MW which was accepted by the petitioner and given in the form of Performance Bank Guarantee (herein referred to as PBG). The same shall be invoked if the petitioner did not commission the project

with extended commissioning term of 5 months from the scheduled commissioning date of 15 months.

7.8. The petitioner's project was granted 230KV connectivity in existing TANTRANSCO Rasipalayam 400/230-110 KV Substation, for evacuation of power from the 250 MW project of the petitioner. The petitioner had to erect a 230/33 KV pooling substation @ Koothampoondi and 230 KV and EHT line up to the bay in the TANTRANSCO Rasipalayam 400 KV substation, for evacuation of 250 MW of power as per the PPA. But so far, even after a lapse of nearly 2 years from the date of signing of PPA, the work of establishment of proposed Koothampoondi 230/33KV pooling station has not started and the petitioner has not erected a brick in the site so far. The act of the petitioner clearly shows the lack of commitment to stick to the conditions laid down in the PPA to complete the project within the time schedule mandated in the PPA.

7.9. The allegation that the bay is not available at Rasipalayam400/230-110KV substation is wrong and misleading. The allegation is being made before the Commission to delay the encashment of PBG due to its incapability to commission the project as per the PPA. The Rasipalayam 400/230-110 KV station with a financial outlay of around Rs.630.46 crores is established by TANTRAN5CO for exclusively evacuating the RE power and the 400KV substation was commissioned on 31.08.2017 with an evacuationcapacity of 900MW, well before the date of signing of PPA. So far, only 300MW of Wind Power substation owned by the developer was connected to this substation and at no point of time has the

respondents denied connectivity to the petitioner. Hence, the claim of the petitioner that there is no connectivity for their project is highly imaginary and also legally untenable.

7.10. It is the lookout of the respondents to provide connectivity to the petitioner in any way as per the terms of the PPA. At no point of time during the tenure of the PPA, has TANGEDCO denied evacuation or communicated its inability to provide evacuation. The petitioner relies on an internal communication dated 26.09.2018 and puts the petitioner to strict proof of how it had received a copy of an internal communication of the respondent Board. TANGEDCO, has at no point of time denied the petitioner the connectivity or the bay as claimed by the petitioner. The petitioner's inability to commence the project in time is the actual fact. To cover up the same, the petitioner has raised irrelevant issues having no nexus to the petitioner's failure to commence and commission the project in time.

7.11. As per section 10(1) of Electricity Act 2003, the generator has to establish, operate and maintain the plant, tie line, substation and dedicated transmission line. There is no question of confirmation since TANGEDCO has already communicated vide letter dated 18.09.2018 that upon payment of tentative bay cost of Rs.674.298 lakhs within 30 days from the date of receipt of the letter, reservation of 2 Nos. of 230 KV bays of connecting side of Rasipalayam 400 KV SS could be feasible or else the petitioner at his own cost could construct the bays at Rasipalayam 400/230-110 KV substation with payment of tentative establishment and supervision charges of Rs.186.0 Lakhs. The petitioner has not even paid the

charges for the bay and is attempting to mislead the Commission. It is only the petitioner who has failed to remit the amount for the bay or construct bays at his own cost and now transfers the blame upon the respondent.

7.12. The respondents are ready to make all efforts to evacuate power if generated by the petitioner, since TANGEDCO is in need of wind power for fulfilling its RPO compliance. The non-commissioning of the project by the petitioner will force TANGEDCO to purchase power from the market at higher rate causing loss to TANGEDCO and in turn to the general public. In fact, TANGEDCO deserves to claim more compensation from the petitioner by way of difference in cost of purchase from the tendered rate of RS.3.42 per unit which is only due to non-commissioning of the project. The LD clause in the PPA was approved by the TNERC only to offset the loss to TANGEDCO and in turn to general public which the petitioner is deliberately trying to deny by misleading the Commission.

7.13. The petitioner has no real intention to start the project and has not even finalised the land and the profile of substation and EHT line for their pooling substation, which is a basic requirement for any project. Due to its apparent lack of capability and seriousness in executing their project, the petitioner has failed to fulfil its functions under the PPA. The whole responsibility of the 250MW project from concept to commissioning lies with the petitioner. The connectivity based on the load flow study is approved and communicated to the petitioner vide CE/NCES letter dated 25-11-2017.

7.14. TANGEDCO's role in the tender is fulfilled and it is thereafter only the petitioner's scope to establish the pooling substation and Extra High Tension (EHT) lines and the WEG's to supply power to TANGEDCO for its requirement within 15 months from the date of signing of PPA. But the petitioner till date hasnot even put a brick in place and has not commissioned the project due to reasons best known to them, which has resulted in huge loss to TANGEDCO since its energy planning to serve the general public is nowthrown out of gear due to non-realization of wind power from January 2019.

7.15. Having failed in all attempts to extend the time of the project, by no valid reasons on their side, the petitioner is now seeking the intervention of the Commission to escape from the legitimate penalty as per PPA terms for non-commissioning of its project.

7.16. The PBG is one way of securing the loss caused to the procurer due to non-compliance with the committed time frame in the Tamil Nadu Transparency in Tenders Act, 1988. The said Act also discourages the non-serious player in the tender failing which the whole tendering process becomes meaningless. If at all this avenue is blocked then the whole tendering process becomes meaningless and becomes a precedent for diluting the whole tenor of the statute and the contracts entered into from time to time.

7.17. The Hon'ble Supreme Court vide its order dated 07.08.2007 in Himadri Chemicals Industries Ltd vs Coal Tar Refining Company (2007 AIR SC 2798).....held:

“10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC 568], this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly, this court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.”

7.18. The petitioner's failure in taking any step in aid of the project for several months after the signing of the agreement disentitles it to any discretionary relief. The respondents are the ones who have to bear the responsibility and financial burden of ensuring that its consumers are not impacted by the failure of generators such as the petitioner herein to supply committed energy and the respondents cannot do this without the performance bank guarantee.

7.19. Regarding the allegations that the petitioner has paid a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) under protest as required by the Registry, the petitioner cannot contest the same as any application or grievances made to the Commission shall be made by payment of the appropriate fees specified in the schedule to the Tamil Nadu Electricity Regulatory Commission - Fees and Fines Regulations, 2004.

8. Counter affidavit dated 24-09-2019 filed by the Respondent on the main petition:-

In the counter affidavit filed by the Respondent on 24-09-2019 on the main petition, the Respondent has reiterated its submissions made in the counter to the I.A. No.6 of 2019, besides the following additional submissions:-

8.1. The Rasipalayam 400/230-110 KV Substation was commissioned on 31-08-2017 i.e. well before the date of signing of PPA. It is the lookout of TANGEDCO to provide connectivity to the petitioner in any way as per the terms of the agreement. At no point of time, during the tenure of the PPA, has TANGEDCO

denied evacuation or communicated its inability to provide evacuation. Hence, the allegation of the petitioner is highly imaginary and misleading this forum to camouflage its inability to commission the project.

8.2. The petitioner's project was granted 230KV connectivity in the existing TANTRANSCO Rasipalayam 400KV Substation. For evacuation of power from the 250 MW project of the petitioner, the petitioner had to erect a 230/33 KV pooling substation @ KoothampoondiVillage and 230 KV and EHT line up to the bay in the TANTRANSCO Rasipalayam 400 KV substation, as per the PPA terms. Being so, as alleged by the petitioner, the load flow study for 250 MW with 2x100 MVA + 1X50 MVA power transformer has been conducted based on the payment of load flow study charges.

8.3. Insofar as the averments in paragraph 4 (h) of the affidavit of the petitioner is concerned, the change of request after load flow study, for having 2 x 125 MVA Power Transformer instead of already requested and approved 2 x 100 MVA + 1 x 50 MVA Power Transformer at pooling substation, the request for change of Power Transformer configuration was refused based on the technical non feasibility which TANGEDCO has every right.

8.4. Insofar as the averments in paragraph 4 (k), 4 (l) & 4 (m) of the affidavit of the petitioner, the petitioner has no real intention to start the project and has not even finalised the land and the profile of substation and EHT line for their pooling substation, which is a basic requirement for any project. Due to its apparent lack of

capability and seriousness in exceeding their project, the whole responsibility of the 250 MW project from concept to commissioning lies with the petitioner. The connectivity based on the load flow study is approved and communicated to the petitioner vide CE/NCES letter dated 25-11-2017.

8.5. TANGEDCO's role in the tender is fulfilled and it is thereafter only the petitioner's scope to establish the Pooling Sub Station and Extra High Tension (EHT) lines and the WEG's to supply power to TANGEDCO for its requirement within 15 months from the date of signing of PPA. But the petitioner till date has not even put a brick in place for starting the project due to reasons best known to them, which resulted in huge loss to TANGEDCO since its energy planning to serve the general public is now thrown out of gear due to non-realization of wind power from January 2019 by which time the petitioner is supposed to complete the project of 250 MW as per the PPA terms. Having failed in all attempts to extend the time of the project by no valid reasons on their side, the petitioner is now seeking the intervention of this Commission to escape from the legitimate penalty as per PPA terms for non-commissioning of its project.

8.6. Insofar as the averments in paragraph 4 (n) of the affidavit of the petitioner having failed to pay the required amount and keeping idle the connectivity given at Rasipalayam 400 KV SS erected by TANGEDCO with huge investment, the petitioner illegally got the copy of the internal communication between TANGEDCO wings which are meant for some other purpose, for escaping from the penalty devised in the PPA for their incompetence to complete the project. TANGEDCO

has at no point of time, denied the petitioner the connectivity or the bay as claimed by the petitioner. The petitioner has not even paid the charges for the bay and misleading this court. It is submitted that the petitioner's inability to commence the project in time is the actual fact. To cover up the same, the petitioner has raised irrelevant issues having no nexus to the petitioner's failure to commence and commission the project in time. After about 20 months from the date of signing PPA, the petitioner in para4 (t) of its affidavit, casually states that it resolved the issue of procurement of land and expressed their willingness to develop the project. This only proves the failure on the part of the petitioner, which obviously, disentitles it to any relief.

8.7. Insofar as the averments in paragraph 4(0), 4(p) & 4(q) of the affidavit of the petitioner, the allotment of bays which is the interconnection metering point to the Rasipalayam 400 KV SS will be considered only after the completion of pooling SS and the EHT lines to the Rasipalayam 400 KV SS. It is only a consequential responsibility of TANGEDCO to evacuate wind power from the petitioner's project. TANGEDCO has already communicated its approval for connectivity to the Rasipalayam 400 KV SS. Having communicated already it is the responsibility of TANGEDCO to evacuate power if the petitioner has completed the project.

8.8. Insofar as the averments in paragraph 4(r) of the affidavit of the petitioner, TANGEDCO vide letter dated 18.09.2018 has intimated the petitioner to remit the bay amount and intimate the TANGEDCO within 30 days for reserving the bay constructed already anticipating the project developer like the petitioner or

allocating the space to the petitioner, if the petitioner is willing to construct bays on their own within 30 days.

8.9. The petitioner has not paid the amount so far. Even if the petitioner is willing to construct its bay, it has been asked to pay Establishment and Supervision charges of Rs.180.0 Lakhs and give their consent accordingly. They have not paid this amount also, which clearly establishes that the petitioner is not serious about commissioning their project. Therefore, TANGEDCO has not given their approval for bay is wrong.

8.10. There is no question of confirmation since TANGEDCO has already communicated vide letter dated 18-09-2018 and it is only the petitioner who has failed to remit the amount for the bay.

8.11. Invoking the bank guarantee as per the tendering specification and PPA terms is the right of the procurer and also to discourage the non-serious player in the tender failing which the whole tendering process becomes meaningless.

8.12. The evacuation facility was made available to the petitioner and TANTRANSCO was ready to give connectivity at any point of time to commission the petitioner's project if the petitioner was ready to commission the project.

8.13. Due to delay in commissioning the 250MW of wind project, the TANGEDCO is denied of 250 MW wind power which affects its energy planning which in turn

causing financial loss more than the bank guarantee given by the petitioner since TANGEDCO may be forced to purchase RE power from open market.

8.14. Further TANGEDCO is committed to purchase @ Rs.3.42 per unit as per the PPA if the project is commissioned as per the commissioningschedule even though the wind Tariff has been drastically reduced to Rs.2.44 per unit. Even the TNERC Tariff rate as per the Tariff Order No.6 of 2018, is only Rs.2.80/- per unit.

8.15. If the petitioner is allowed to block the encashment of bank guarantee, it will make the very fair tendering process itself meaningless, and escapes from the penalty for his lapse in commissioning the project as per the agreement which will make all the agreement vulnerable.

8.16. TANGEDCO deserves to claim more compensation from the petitioner by way of difference in cost of purchase from the tendered rate of Rs.3.42 per unit which is only due to non-commissioning of the project.

8.17. The evacuation capacity of 250 MW is blocked by the petitioner and becomes idle due to non-commissioning of the project which will otherwise be beneficially utilized for other project, since this evacuation facility is made with huge financial outlay of Rs.630.46 crores from the public money.

9. Reply by the Petitioner to the Counter Affidavit filed by the Respondents:-

9.1. The Petitioner has not been in breach of the PPA. Infact it is the specific contention of the Petitioner that the alleged defaults under the PPA, if any, is in any case owing to the inactions/ omissions of the Respondents. The Petitioner apprehends that the Respondents may, maliciously and/ or illegally invoke the PBG submitted by the Petitioner, which will hinder the Petitioners capability of completing the Project and has therefore filed the present application.

9.2. Further, severe loss and hardship will be caused to the Petitioner if the PBG is invoked in as much as it will not only affect the Petitioner financially, severely affecting its capability of completing the project, but will also taint the reputation of the petitioner.

9.3. The Respondents have presupposed that the Petitioner is required to set up the entire 250 MW Project, inspite of delays made by the Respondent. The commissioning date is dependent upon certain conditions, one of which being the Respondent providing adequate evacuation facilities and another critical aspect being that the Respondents honour their payment and payment security obligations in order for any investor or financial institution to consider this project to be commercially viable for investment.

9.4 The petitioner approached the 1st Respondent requesting them to issue a demand note in favour of the petitioner in order to enable them to make payments towards the bay costs. There has been no response to the letter till date, neither

has there been any confirmation pertaining to the bay allocation, despite the lapse of nearly 2 years from the date of signing of the PPA.

9.5. Without the confirmation of the bay availability itself, and consequently, the evacuation facility, which is one of the most crucial and preliminary obligations of the Respondents, it is surprising to note that the Respondents are attempting to evade all liabilities and are proceeding on the footing that the petitioner has not been committed to completion of the project.

9.6. The order in M.P. No.42 of 2008 has no application on this matter *per se*. In addition to this, the Respondent is seeking to take advantage of the purportedly accommodative attitude adopted by it at the initial stages of the project.

9.7. The Rasipalayam 400/230-110 KV substation cannot accommodate any more bays as it stands today. This is further evidenced by the fact that the 4th bay, allotted to TANTRANSCO itself has not been completed yet.

9.8. Inasmuch as the Respondents are attributing the non-confirmation of bay facilities on the petitioner without even having raised a debit note with respect to the same, the petitioner cannot, under any circumstances be expected to make payments for the bay without having any debit notes being raised upon it merely because the 1st Respondent, has on an earlier occasion, provided the petitioner with details of the cost of each bay.

9.9. The petitioner through its turn-key project contractor i.e. Siemens-Gamesa, has in fact purchased the requisite land for the pooling sub-station. Further, from the required 125 locations required for setting up the wind energy generators, lease deeds have been entered into for forty locations, whereas negotiations are being carried out for the remainder of the 85 locations.

9.10 It is due to this delay in responding to the petitioners aforementioned letter with regard to raising demand note for allocation of bay that the entire project has come to a standstill, as it is not feasible for the petitioner to carry on any further work in the absence of confirmation of a bay, or assurance of evacuation facility, which is a crucial requirement in the project.

9.11. The Respondents cannot, under the guise as a saviour of public money seek encashment of the PBG when it is not supportive of serious players such as the Petitioner, as evidenced by the proactive steps taken by it, entirely out of its own efforts and funds in completion of the 50 MW of the Project. In order to be able to make such tall claims, the Respondents must provide effective, timely and satisfactory support to wind power generators such as the Petitioner, in order to effectively generate power which will ultimately be beneficial to the general public. Instead of providing any such support, the Respondents place such hindrances and obstacles in the way of serious players, which force them to pursue litigations and thereby cause severe loss not only to such petitioners but also to the State exchequer and the general public.

9.12. The Respondent does not have locus to comment on the court fee matter under consideration by this Commission and has no bearing on this Respondent. Though the Respondent claims to be ready and willing to evacuate the petitioner's project, the Respondent is still not in a position to confirm the bay availability to the petitioner. The same is evidenced by the fact that the 4th bay allotted to TANTRANSCO has still not been completed, and it cannot be completed owing to its proximity to the PGCIL corridor running through the Rasipalayam substation.

9.13. The illegal invocation of bank guarantee will be severely prejudicial to the interests of not only the petitioner but also the project, which the petitioner is more than capable of completing. There is no urgency for the Respondent to invoke the bank guarantee during the pendency of the main petition, and neither has the same been averred or established.

10. Project Report filed by the Petitioner:-

10.1. The Leap Green has installed over 750 MW energy and has set up over 580 wind turbine generators across the country. Leap Green has set up the Petitioner company, M/s Corolla Green Power Private Limited ("**Corolla**"), for the purpose of establishing a 250 MW wind power project in the State of Tamil Nadu ("**Project**").

10.2. The Petitioner engaged a leading Original Equipment Manufacturer and turnkey project company, M/s. Siemens Gamesa Renewable Power Private Limited ("**Siemens-Gamesa**") for supply, development, erection and commissioning of 125 nos. of 02 MW wind turbines totalling to 250MW Wind Power Project. Siemens-

Gamesa is a leading supplier of wind power solutions to customers all over the globe.

10.3. The Leap Green, in association with Siemens-Gamesa submitted its bid when the 1st Respondent had invited bids to establish, maintain and operate wind power plants of 500 MW in the State of Tamil Nadu at the rate to be finalized through reverse bidding. Upon perusing the request for submission document issued by the 1st Respondent, Siemens-Gamesa raised certain queries to assess the viability of the Project. Leap Green, upon being satisfied with the responses issued by the 1st Respondent to the queries raised by it and the other bidders, proceeded with completion of the pre-bid formalities:

10.4. Pursuant to acceptance of its bid, Leap Green incorporated the Petitioner herein, a 100% wholly owned subsidiary to undertake the Project. Thereafter, the Petitioner requested the 1st Respondent to issue a demand note in favour of the Petitioner enabling it to remit the applicable application fee, registration fee, consultation fee, load flow study charges and the refundable security deposit. On 06.10.2017, the Petitioner requested and followed up with the 1st Respondent for obtaining evacuation approval at Rasipalayam.

10.5. Siemens-Gamesa evaluated and conducted an evaluation of the potential sites wherein detailed wind resource assessments (“**WRA**”) were carried out with respect to the ability of the site to capacitate 250 MW, its proximity to the substation and PLF factors and provided an Annual Energy Production WRA report. These results have also been cross-verified by the Petitioner’s internal team. Further, the

Petitioner appointed an external advisor, AWS Truepower India, LLP, which has verified the results of the WRA conducted by Siemens-Gamesa.

10.6. On 10.10.2017, the Petitioner made payment of Rs.1,50,000 (Rupees One Lakh Fifty Thousand Only) as charges for conducting the load flow study.

10.7. On 12.10.2017, the Petitioner furnished a performance bank guarantee for an amount of Rs.25,00,00,000/- (Rupees Twenty Five Crores Only) corresponding to Rs.10,00,000 (Rupees Ten Lakhs Only) per MW. Subsequently, on 16.10.2017, the Petitioner and 1st Respondent entered into an Energy Purchase Agreement for the establishment and development of the Project. Due to the bidding under SECI-II-1000 MW (e-Reverse auction), the successful bidders chose to set up the project at Thennampatty. Therefore, the Petitioner had to evaluate different locations and focus on Rasipalayam for its sub-station. Accordingly, an Addendum to the EPA dated 04.12.2017 ("**Addendum to EPA**") was executed to change the location of the Project to Koothampoondi area, Ottanchatram Taluk, Dindigul District due to constraints in purchase of land and right of way issues.

10.8. On 09.02.2018, the Petitioner sought approval for change in the evacuation approval issued by the 1st Respondent which was rejected by the 1st Respondent on 14.03.2018. Subsequently, the Petitioner identified the land required for the establishment of the 230/33 KV PSS and the same was taken on lease registered at Tirupur Registration District, Moolanur Sub-Registrar office vide registration number 777/2018 located at SF No. 808 and 809 of Kilingkundal Village,

Dharapuram Taluk in Thirupur District on 25.04.2018. The Petitioner informed the Respondent of the same on 28.05.2018.

10.9. On 16.10.2018, the Petitioner informed the 1st Respondent that it required only one bay for connecting the 230/33 kV- Koothampoondi substation with the 230-kV side of Rasipalayam 400 kV substation, requesting the 1st Respondent to issue a demand note for the applicable charges in favour of the Petitioner. Till date no response has been received from the Respondent for the same regarding the construction of the bays, nor has any confirmation regarding the final cost for establishing the required bay (one no.) for the Project or demand note in respect of the same been provided. The entire project has come to a standstill inasmuch as the development of a project requiring about Rs.1500,00,00,000 (Rupees One Thousand Five Hundred Crores Only) has become currently unfeasible for the Petitioner since power cannot be evacuated even if commissioned.

10.10. It is only upon confirmation of the evacuation bay(s) and provision of said facilities can the further development of the project commence in as much as the pooling sub-station, EHV line and bay expansion work, which are dependent on the availability of the evacuation bay(s). The erection of the wind turbine generators and the unit sub-station, etc must be constructed only upon confirmation of the evacuation facilities. However, the Petitioner is committed towards completion of the Project and will, upon confirmation of the evacuation facilities and obtaining financial closure, endeavour to commission the project in an expedient manner. The petitioner approached and negotiated with several project lenders for the

purpose of obtaining term loan for the project. Upon due consideration of necessary factors, the petitioner finalized L& T Infrastructure Finance Company ("L&T") to be its project lender.

10.11. The Petitioner has already obtained financial closure inasmuch as it had made arrangements to contribute a sum of INR 406,00,00,000/- (Indian Rupees Four Hundred and Six Crores Only) though its promoters and obtained financial arrangement confirmation for a sum of Rs.1,220,00,00,000 (Rupees One Thousand Two Hundred Twenty Crores Only) from L&T. The Petitioner presented a certificate dated 09.05.2018 from its Chartered Accountant, D.P.V.P and Co.

10.12. The 1st Respondent has continually been defaulting in its obligations to the other successful bidder (RegenPowertech Private Limited) that has completed a part of its project inasmuch as it has failed to provide permanent evacuation facilities, opening of revolving letters of credit as and when liable to do so, and making timely payments.

10.13. Subsequent to the findings by L&T, the Petitioner had to re-evaluate the viability and feasibility of accommodating an additional 230- kV bay at the Rasipalayam Grid substation and identified the following issues:

- The construction of existing four nos. of 230kV bays allotted to TANGEDCO are yet to be completed.
- PGCIL 400kV line (Salem to Udumalpet) is running very close along with the existing 230kV bays at Rasipalayam GSS.

- One of the existing 230kV bay which is under construction has been delayed for safety reasons, as the said PGCIL line running very close to the 230kV bay.
- There is no required space available for constructing two additional bays of 230kV.
- Even one additional bay cannot be constructed since the 400kV line is running very close to the 230kV Bays.

10.14. L&T is still able and willing to finance the project upon successful completion of the aforementioned, more specifically the availability of permanent evacuation facilities, opening of revolving letters of credit on commissioning of project and evidence of timely payments.

10.15. The petitioner has developed the project so far as it was possible, however several critical and integral parts of the project remain to be completed, which can be completed only pursuant to the availability of the evacuation facilities.

10.16. Upon receipt of the confirmation of permanent evacuation facilities, L& T will provide the petitioner with the financial drawdown, pursuant to which, the remainder of the project will be undertaken.

10.17. In the light of the above, it is submitted that the petitioner will require eighteen months to complete the project after the date of evacuation facilities being confirmed and payment security being provided to the petitioner.

11. Project Report submitted by TANGEDCO:-

As directed by the Commission vide the Daily Order dated 09-08-2019 TANGEDCO has submitted the Project Report. In the said Report, the following are furnished:-

(i) As per the PPA and load flow study conducted, the project of 250 MW to be developed by the petitioner is to be connected in the Rasipalayam 400/230-110 KV SS developed by TANTRANSCO for RE evacuation.

(ii) The Rasipalayam 400/230-110 KV SS is sanctioned by the Board vide B.P. No. 59, dated 03.12.2012 at a cost of Rs.630.46 Crores. The Rasipalayam 400/230-110 KV SS has the capacity of 900 MW.

(iii) The Rasipalayam 400/230-110 KV SS with 4 Nos. 230 KV bay (the inter connection point of the generator) and 5 Nos. 110 KV bays and commissioned on 31.08.2017.

(iv) As such the Rasipalayam 400/230-110 KV SS can evacuate the full power generated from the petitioner's projects of 250 MW, if commissioned.

(v) The petitioner has to erect the 230/33 KV pooling Substation at Koothampoondi area as per the PPA to evacuate 250 MW power from the petitioners project. The petitioner has not yet started the work of this 230/33 KV

pooling Substation nor the 230 KV tie line to the Rasipalayam 400/230-110 KV SS, till date.

(vi) Further the non-commissioning of the project by the petitioner denies the TANGEDCO the legitimate RE power to an extent of 250 MW which is needed for fulfilling the Renewable Purchase Obligation (RPO).

Hence, it is submitted that, since the TANGEDCO has fulfilled its obligation under PPA, and also deprived of the legitimate RE power, it is prayed that interim prayer of the petitioner may be dismissed and allow the TANGEDCO to invoke the performance bank guarantee to partially offshoot the losses to the TANGEDCO.

12. Affidavit in Reply to the Project Report and Photos with regard to the evacuation infrastructure to the Tender Project of the Petitioner filed on behalf of the Respondents:-

12.1. The Petitioner had, much prior to the date of commissioning of the Project, on 16.10.2018 issued a communication to the 1st Respondent stating that it required only one bay for connecting the 230/33 kV-Koothampoondi substation, and requested it to issue a demand note for the applicable charges in favour of the Petitioner, however, the 1st Respondent has, till date, not issued any response to the same, nor has it allotted any bay to the Petitioner.

12.2. The 1st Respondent has further acknowledged its responsibility to provide adequate evacuation infrastructure in its response to pre-bid queries. A reference may be drawn to Clause 77 (iii) at page no. 20 of the document for the same. In fact, it is pertinent to state that bay No.4, that ought to have been built and handed over to TANTRANSCO itself has not been completed till date. The construction of the 5th bay, has therefore, obviously not commenced yet. It is therefore glaringly evident that the 1st Respondent is purposely concocting stories and making bald but false averments to hide its own misdeeds and inactions.

12.3. The construction of the 4th bay has come to a standstill owing to the fact that the PGCIL line from Salem to Udumalpet Green Corridor is very close to the 230 kV bays. It was further found that the take-up tower of the aforementioned 4th bay is within 5 meters of the PGCIL's high tension line. The said tower, if constructed, will be in gross violation of the provisions of the CEA Regulations, 2010 (Safety and Electric supply), more specifically of clause 69, which indicates the minimum clearance in meters between lines crossing each other to be at least 5.49 meters.

12.4. The 1st Respondent, after conducting the load flow study, vide letter dated 25.11.2017, gave its concurrence to interface the Petitioners wind power plant with the Rasipalayam 400/230-110 kV substation, upon duly deliberating the same internally, as evidenced by the letter dated 12.10.2017 issued by Superintending Engineer, NCES to the Chief Engineer, NCES, both of the 1st Respondent company. Further, the 1st Respondent has till date not informed the Petitioner of the problems posed by PGCIL's high tension line owing to which the allotment of bay

has not taken place.

12.5. The erection of the pooling substation at Koothampoondi area was not undertaken due to lack of clarity on the status of evacuation facilities being made available to the Petitioner, which the 1st Respondent is obligated to provide, statutorily under section 2.8 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and contractually under section 2(d) of the PPA. The Petitioner shall complete the erection of the 230/33 kV pooling substation upon permanent evacuation facilities being made confirmed to it and payment security being provided within the stipulated time.

13. Proposal for Settlement filed by the Petitioner:-

13.1. The Commission directed the petitioner and Respondents to file their respective status reports pertaining to the project in dispute. Consequently, the petitioner and Respondents filed their respective status reports and the matter was heard in detail. Upon hearing the petitioner and Respondent extensively, the Commission reserved orders in the said I.A. No.5 of 2019 on 15-10-2019 and observed that the matter is one that can be settled and urged the Petitioner and Respondents to explore the possibility of amicable settlement by mutual good faith discussions.

13.2. Based on the Commission's advice and direction, and in good faith, the Petitioner and Respondents had multiple rounds of discussions and negotiations and the Parties have agreed to settle the matter amicably, in the interest of

implementing the Project without any further delay and to take care of the larger public good that will arise from generation of energy from renewable sources.

13.3. The Petitioner is willing to execute the Project for a reduced tariff rate of Rs.3.32 per unit as opposed to the earlier agreed rate of Rs.3.42 per unit subject to the following terms: -

- (a) The Petitioner is willing to commission the Project at a reduced capacity of 200 MW from the earlier agreed 250 MW under the EPA with higher CUF in order to supply the same quantum of energy to TANGEDCO approximately 59.57 crores units per annum on an average.
- (b) TANGEDCO be required to provide the Petitioner with 1 (one) exclusive bay out of the presently available 4 numbers of 230/400 kV bays in Rasipalayam 400 kV sub-station for the entire life of the Project without any interference by the Respondents or TANTRANSCO. With the revised project capacity of 200 MW, TANTRANSCO / TANGEDCO will be able to use the remaining available bays for own use by TANTRANSCO / TANGEDCO.
- (c) The reduced tariff of Rs.3.32 per unit shall not be further reduced at any point in time and shall be applicable uniformly for all the units supplied by the Petitioner till the lifetime of the Project, without any limitations or higher CUF that may result from the Project.
- (d) TANGEDCO shall furnish a monthly revolving Letter of Credit as per

the current guidelines issued by Ministry of Power dated 28.06.2019 for an estimated value of the bill for one month. In any case TANGEDCO shall strictly adhere to the EPA and the Addendum to the Energy Purchase Agreement dated 04.12.2017 ("Amended EPA") with regard to the Payment terms.

- (e) The Petitioner be granted 18 months for achieving the commissioning (as required under clause 16(b) of the EPA and clause 4 of the Amended EPA) from the date of execution of the newly amended Energy Purchase Agreement pursuant hereto and allocation of bay at the Rasipalayam 400 kV sub-station for the commissioning of the Project.
- (f) The Performance Bank Guarantee provided by the Petitioner in 0753617BG00000139 for a sum of Rs.25,00,00,000/- (Rupees Twenty-Five Crores Only) as extended on 14.10.2019, be kept valid for a sum of Rs.20,00,00,000/- (Rupees Twenty Crores Only) corresponding to the revised Project capacity of 200 MW until the completion of the Project and reduced proportionately with the commissioning of each part of the Project.
- (g) Rest of the terms of EPA and the Amended EPA that are not amended by the above proposals shall continue in force.

13.4. Based on the proposal of the Petitioner for a reduction of 10 Paise on the originally proposed tariff rate of Rs.3.42 per unit, TANGEDCO will be saving an

estimated substantial sum of about Rs.150,00,00,000/- (Rupees One Hundred and Fifty Crores Only) for the EPA period of 25 years.

14. Written Arguments filed on behalf of the Petitioner:-

The petitioner in its written submission filed on 06-10-2020 has submitted as follows:-

14.1. The Petitioner's parent company, Leap Green Energy Private Limited ("Leap Green") is a fast growing and multifaceted power generating company on the rise from Southern India as an independent power producer dedicated to power production through renewable resources and is now looking to create a mass awareness on use of Green Power. Leap Green today owns, through its various SPV's, including the petitioner herein, an operational capacity of 751 MW and 400 MW under construction which makes 1.2 GW of wind assets and is determined to expand to beyond 5 GW by the year 2023. Its portfolio of interests includes Wind, Wind / Solar Hybrid, Repowering, Energy Storage and Offshore wind at various stages of development. Ever since its inception in 2009, Leap Green has been acquiring assets and establishing wind farms in various parts of the country, more particularly Tamil Nadu, Rajasthan, Madhya Pradesh and Maharashtra. Leap Green has installed 751 MW energy and has set up over 580 wind turbine generators across the country.

14.2. It is industry wide practice that any power generating company, while undertaking a project upon being awarded with the project, will obtain financial closure by raising funds from third party lenders to complete the project, and the

returns from the project will be utilized for repaying the lending facilities obtained. Subsequently, power generating companies procure lands for the purpose of setting up the wind power generation project in consultation with the State utility boards which provide them the said project. Power generating companies will also approach OEM companies for the supply, erection and commissioning of wind turbines on turn-key basis to produce power and supply to the State utility. Accordingly, the Petitioner has been conducting its business of generation and supply of power over the last 10 years.

14.3. The 1st Respondent approached this Commission under M.P. No. 10 of 2017 and pursuant to the approval dated 02.06.2017 and 10.7.2017 granted by this Commission, invite bids to establish, maintain and operate wind power plants of aggregate capacity of 500 MW in the State of Tamil Nadu at the rate to be finalized through reverse bidding, considering the fixed tariff ceiling of Rs.3.46 (Rupees Three paise and forty six only) per unit as the upper limit. Thereafter, Tender specifications through Request for Submission document No. CE/NCES/O.T No.2/2017-18 ("**RfS**") was issued for this purpose.

14.4. Upon going through the RfS, the petitioner's parent company, Leap Green) engaged an OEM company, M/s. Siemens Gamesa Renewable Power Private Limited ("Siemens") for supply, development, erection and commissioning of 125 Nos. of 02 MW wind turbines totaling to 250 MW wind power project on turnkey basis. Such OEM contractors are chosen after careful consideration of the various critical techno-commercial factors envisaged under the project time lines, evaluating the ability of each of the potential

OEM's to carry out the project in a viable and effective manner and conducting internal analysis and studies on each of the potential OEM companies.

14.5. Leap Green along with Siemens attended the pre-bid meeting called for by the Respondents to clarify any queries that potential bidders had in relation to the Project. A specific query was raised by a wind power developer pertaining to connectivity issues, since the RfS (under clause 17.0 (iii)) places the entire responsibility of obtaining connectivity within the time period on the wind power developers. The Respondent has stated in its reply to the Pre-Bid queries that **"the evacuation infrastructure will be made available in time"** and based on that assurance, wind power developers were constrained to forego deemed generation based payments.

14.6. The 1st Respondent has admitted to and accepted its responsibility to make evacuation infrastructure facilities available in a timely manner, having recognized, agreed and acknowledged that time is the essence in such projects. It is solely based on representations made by the Respondents in the RFS and the responses to the pre-bid queries, including the above stated representation, Leap Green consultation with Siemens) submitted its bid for the Project.

14.7. Leap Green fulfilled and demonstrated its ability to fulfill the following technical and financial requirements in order to qualify for the bid:

"Technical requirements:

- a. *Deploying a WTG with a type **certificate listed in the Revised List of Models and Manufacturers (RLMM)** released by the MNRE.*

- b. Wind forecasting to be carried out as per the Indian Electricity Grid Code, 2010 and communicating the same to the State Load Despatch Center (SLDC)*
- c. Providing the LVRT arrangement before commissioning of the WTGs.*
- d. Forecasting wind turbine generation.*

Financial requirements:

- a. Net worth of Leap Green was greater than the value calculated at the rate of Rs. 10 Lakhs (Rupees Ten Lakhs) per MW of the proposed project capacity. To evidence fulfillment of this criteria, the Leap Green had submitted annual audited accounts of the previous 3 (three) financial years and a certificate from a Chartered Accountant to demonstrate the fulfillment of the criteria.*
- b. Bank Guarantee for an amount of Rs.62,50,000 (Rupees Sixty two lakhs fifty thousand) in lieu of Earnest Money Deposit was submitted to the Respondent."*

14.8. The Leap Green had submitted its bid to sell the generated wind power to the 1st Respondent at the rate of Rs.3.43 (Rupees Three Paise and Forty Three only) per unit of electricity. However, the Respondents urged the bidders to reduce their bid to Rs.3.42 (Rupees Three Paise and Forty Two only) per unit. Of the other bidders, one did not fulfill the technical and financial requirements and another refused to match the Respondents requirement of bidding at Rs.3.42 (Rupees Three and Paise Forty Two only) per unit. The Leap Green however, agreed to supply the electricity at Rs.3.42 (Rupees Three and Paise Forty Two

only) per unit and therefore the Respondents selected Leap Green as a successful bidder and issued a Letter of Intent vide Lr. No.CE/NCES/SE/SOLAR/EE/WPP/AEE2/F.M/s. Leap Green Energy Pvt. Ltd. D.2068/17 dated 21.09.2017 ("LoI") on the terms and conditions specified under the Tender.

14.9. By way of letter dated 03-01-2017 to the 1st Respondent, Leap Green communicated that a Special Purpose Vehicle (a 100% owned subsidiary) by the name of M/s.Corolla Green Energy Pvt. Ltd. (the petitioner herein) had been formed to undertake the project in line with the terms of the RfS. Even though the Respondent had invited bids for 500 MW, the petitioner's parent company was conscious of its ability and capability to undertake the project and applied only for 250 MW, which was granted.

14.10.The Petitioner and the 1stRespondent executed an Energy Purchase Agreement on 16.10.2017 ("EPA") for establishment of the 250 MW wind power project ("Project") at ParivillikottaiVillage, OttapidararnTaluk, Turicorin District. An Addendum to the EPA dated 04.12.2017 (Addendum to EPA) was executed to change the location of the project to Koothampoondi area, OttanchatramTaluk, Dindigul District due to constraints in purchase of land and right of way issues. The petitioner also submitted a Performance Bank Guarantee dated 12-10-2017 (No.0753617BG0000139) for an amount of Rs.25,00,00,000/- (Rupees Twenty Five Crores Only) valid upto 20-10-2019 ("PBG") at the rate of Rs.10,00,000/- (Rupees Ten Lakhs only) per MW as per

clause 14 of the Rfs, which has now been extended until 20-10-2021, as per the order of this Commission dated 24-09-2019.

14.11. In the PBG, under Clause 5 which states that the PBG shall be invoked based on the account settled between TANEGDCO and Petitioner. The clause is enumerated for the immediate reference of the Commission.

"5. Any account settled between the TANGEDCO and the WPH shall be conclusive evidence against the Bank for the amount due and shall not be questioned by the Bank."

14.12. Till date no accounts were settled between the parties and therefore the proposed and the intention of encash the PBG is illegal and PBG as such is an independent agreement and the parties must follow the terms set out therein in true spirit.

14.13. In Gangotri Enterprises Ltd., Vs. Union of India &Ors (SLP. (C) No. 27052of 2012), the Hon'ble Supreme Court in Page 28 Para 43 observed that every case has to be decided with reference to the facts of the case involve therein. Therefore, just because the terms of the PPA enumerates that the Petitioner if it is unable to achieve financial closure, the PBG will be invoked cannot be strictly followed by the Respondents, for the reason that there existed no evacuation facility for the Petitioner to proceed with the Project. On the one hand the Respondents expect the Petitioner to comply with the terms of the PPA and on the other hand the Respondents refuse to honor its commitments pertaining to evacuation

facilities. Further, the Respondents were also not being transparent regarding the non-availability of the evacuation facility for the Petitioner to complete the Project.

14.14. On the contrary, the Respondents deliberately concealed the non-availability of evacuation facilities and misrepresented by seeking payments towards allocation of non-existent bays in the Respondent's sub-station. Therefore, since there is clearly an obstruction created by the Respondents for the petitioner to perform its obligations in a timely manner in true spirit of the PPA, it is clearly a breach by the Respondent or at the very least of a *force majeure* event, the principle laid down in the aforesaid will apply to the present case and the Respondent must not be allowed to encash the PBG provided by the petitioner. Since no accounts have been settled and that the parties did not mutually settle the accounts, the Respondent must be enjoined from encashing the same.

14.15. The Hon'ble CERC in Kudgi Transmission Ltd. Vs. Bangalore Electricity Supply Company Limited and 11 others (Petition No.248/MP/2016-CERC) has decided that non-availability of the required inter-connection facilities by PGCIL and the law and order caused in villages are force majeure events.

14.16. The initial ROW issued faced by the petitioner (despite securing 45 locations so far) and the non-availability of evacuation facilities (bay availability) for the petitioner are to be construed as force majeure events in terms of the aforesaid order passed by the Hon'ble CERC.

14.17. The 1st Respondent had communicated to the Petitioner *via* letter dated 25.11.2017 that the load flow tests were completed and that the Project can be interfaced with the 400/230-110 kV Substation at Rasipalayam. The Petitioner, therefore, was required to build a Pooling Substation to receive the power generated by the WTGs by way of the 33 kV lines which would then be evacuated through the 230 kV lines to the Rasipalayam 400 kV Substation built and owned by the 1st Respondent. At present, the 400/230-110 kV Rasipalayam Substation owned by the 1st Respondent has 4 (four) 230 kV bays, all of which are being allotted to the 1st Respondents sister concern, Tamil Nadu Transmission Corporation Limited (“**TANTRANSCO**”).

14.18. For reasons best known to the Respondents, they deemed it fit to conceal this vital piece of information and not appraise the Petitioner of the same. Presumably, for this reason the 1st Respondent proposed that the said Substation would be expanded to include 2 (two) 230 kV bays additionally, to accommodate the Petitioner’s Project.

14.19. During the discussions conducted between the Petitioner and the 1st Respondent, it was decided that 1 (one) bay in the Rasipalayam Substation would be granted to the Petitioner from the additional two bays that were proposed to be built by the 1st Respondent, but no technical feasibility report in respect of the same was provided by the 1st Respondent. Therefore, in light of the assurances made by the 1st Respondent in its reply to Pre-Bid queries as well as its assurance to expand the Rasipalayam Substation and provide adequate evacuation infrastructure, the

Petitioner proceeded with its objective of development of the Project as detailed hereinbelow.

14.21. Since the Project location was changed due to issues arising out of procurement of land and right of way issues, submission of the DPR and land details for the proposed Substation were delayed. The Petitioner requested extension of time to submit the same *via* letters dated 20.12.2017 and 09.02.2018 and the 1st Respondent resultantly extended the time for submission of the documents until 30.04.2018 by way of its letters dated 06.01.2018 and 21.02.2018.

14.22. Due to issues in finalizing the Pooling Substation and further the problems in finalizing the shortest route for the 230 kV EHV lines, the Petitioner faced delays in finalizing and registering the land for the Pooling Substation. Therefore, the Petitioner was constrained to approach the 1st Respondent by way of communication dated 20.04.2018 praying for extension of time to submit the notary attested copy of the registered sale deed / lease deed for the proposed Substation land. The 1st Respondent by way of its reply dated 25.04.2018 granted extension until 31.05.2018 for the same.

14.23. The Respondents were continuously providing extensions to the Petitioner, upon its requests, evidently to conceal its own faults and misdeeds in being unable to provide the evacuation infrastructure, as assured. Nevertheless, in compliance with the extension granted by the 1st Respondent, the Petitioner submitted the registered lease deed for establishment of the Pooling Substation along with a

letter informing the 1st Respondent of the same on 28.05.2018 (within the extended time until 31.05.2018).

14.24. Siemens-Gamesa conducted an evaluation of the potential sites wherein detailed wind resource assessments (“**WRA**”) were carried out with respect to the ability of the site to capacitate 250 MW, its proximity to the substation and PLF factors and provided an Annual Energy Production WRA report. These results have also been cross-verified by the Petitioner’s internal team. Further, the Petitioner appointed an external advisor, AWS Truepower India, LLP, which has verified the results of the WRA conducted by Siemens-Gamesa. Of the identified 125 locations, lease deeds have been entered into for 45 locations in favour of Siemens-Gamesa which will eventually be transferred in the Petitioner’s name whereas negotiations were being carried out and were near completion for the remaining 80 locations, which would have in any case been transferred in the name of the Petitioner had the evacuation facilities been made available to the Petitioner on time.

14.25. The 1st Respondent issued a communication to the Petitioner dated 18.09.2018, stating that for connecting the Petitioner’s 230/33 kV Substation with the 230 kV side of the Rasipalayam 400 kV Substation and for reserving 2 (two) 230 kV bays, the Petitioner will be required to make payment of tentative cost for two bays of Rs.6,74,29,800 (Rupees Six Crores Seventy Four Lakhs Twenty Nine Thousand Eight Hundred) (at Rs.3,37,14,900 per bay) within 30 (thirty) days of receipt of the communication or the Petitioner may choose to construct the two bays at its own cost at the Rasipalayam 400/230 kV Substation with payment of

tentative establishment and supervision charges for two bays of Rs.1,86,00,000 (Rupees One Crores Eighty Six Lakhs) (at Rs.93,00,000 per bay). This was firstly in contradiction of the earlier discussions between the Petitioner and the 1st Respondent for allotment of one bay. This was secondly impossible for the 1st Respondent to fulfil for the reasons stated later in these written arguments. The Petitioner was further asked to submit the option letter for constructing the 230kV bays and remit the payment. It was also mentioned in the said letter that only after the payment of bay cost or establishment and supervision charges, bay reservation will be confirmed in the said substation.

14.26. The Petitioner by its letter dated 16.10.2018 notified the 1st Respondent of the earlier discussed arrangement of one bay and communicated its willingness to make payment in respect of the same. Thereby, the Petitioner asked the 1st Respondent to confirm the amount it was required to pay for the construction of one bay, while also requesting the 1st Respondent to raise a demand note on the Petitioner for the said amount, for the Petitioner to make the remittance as per the 1st Respondent's requirement.

14.27. The Petitioner has neither received any confirmation regarding the construction of the bays, nor has any confirmation regarding the final cost for establishing the required bay (one no.) for the Project nor demand note in respect of the same been provided till date. Upon conducting its own due diligence, the Petitioner has been appraised that there is no space available to accommodate the two additional bays as represented by the 1st Respondent or even to complete one

additional bay as sought by the Petitioner to be constructed in the Rasipalayam Substation, since PGCIL power evacuation line (HT line) is running across the land alleged to have been earmarked by the 1st Respondent for the additional bay(s) and therefore, construction of the said bay has been kept in abeyance by the 1st Respondent due to safety concerns and being prohibited by the Electricity Regulations.

14.28. The Petitioner also came to know that the four 230 kV bays at Rasipalayam Substation are already allotted to TANTRANSCO and that no additional space is available for accommodating two more 230 kV bays offered to be allotted to the Petitioner, through the Respondents' own internal communication dated 26.09.2018 which had been issued by the Superintending Engineer-General Construction Circle, TANTRANSCO to the Superintending Engineer-Operation, TANTRANSCO informing the latter that the 400/230-110 kV Rasipalayam Substation has 4 (four) bays, all four of which are being allotted to TANTRANSCO and therefore, there is no additional space to accommodate 2 (two) 230 kV bays for the Petitioner. This led the Petitioner to believe that the required 400/230 kV bay for evacuation of power in the Rasipalayam Substation cannot be allocated to the Petitioner and therefore investing further funds and effort into the Project became unfeasible for the Petitioner until assurance of the entire evacuation facility was provided by the Respondents. The non-availability of appropriate evacuation facility is further glaringly evident by the fact that the Respondents have till date not responded to the letter issued by the Petitioner dated 16.10.2018.

14.29. The primary cause of delay was that of the 1st Respondent not providing adequate evacuation infrastructure or even confirming the possibility thereof, the Petitioner requested the 1st Respondent to extend the Commissioning date for the Project and declare that no liquidated damages are payable by the Petitioner. By way of communications dated 25.09.2018 and 18.12.2018, the Petitioner also communicated that the Petitioner is willing and ready to develop the Project, having resolved any minor issues at its end. The 1st Respondent communicated through its communication dated 09.01.2018 that such extension is not feasible and that the levy of liquidated damages cannot be stopped, without due consideration to the fact that the procurement of funds and evacuation of power has been jeopardized by the Respondents' own actions / inactions. Therefore, the Petitioner was constrained to obtain legal remedy and approach the Hon'ble High Court of Madras by way of a writ petition, since this Commission was not functioning at that point of time. It is further stated that even before the Hon'ble High Court, the Petitioner only sought for extension of time to be granted to the Petitioner and sought for interim relief of staying the encashment of PBG. This was sought only because of the non-functioning of this Commission. Thereafter, upon the direction of the Hon'ble High Court, the Petitioner approached this Commission by way of this DRP.

14.31. The responsibility of the Respondents to provide the evacuation facilities in a prompt, complete and timely manner is undisputed. Section 2.8 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 states as follows:

“2.8 Role of STU

2.8.1 Section 39 of the Electricity Act, 2003, outlines that the functions of the State Transmission Utility (STU) shall be –

(1) (a) to undertake transmission of electricity through intra-State transmission system;

...

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres”

Further, Clause 2(d) of the EPA reads as follows:

“2. Interfacing and Evacuation Facilities:

...

(d) Both Parties shall comply with the relevant provisions contained in the Indian Electricity Grid Code, Tamil Nadu Electricity Grid Code, the Electricity Act, 2003, other Code and Regulations issued by the Tamil Nadu Electricity Regulatory Commission / Central Electricity Authority (CEA) as amended from time to time;”

14.32. In the absence of being able to assure the evacuation infrastructure, a project requiring investments of several hundreds of crores is totally unfeasible. Since there was no assurance that a bay would be allocated in the near future and owing to the total silence and lack of response by the 1st Respondent to the Petitioner’s letter dated 16.10.2018 and further aggravated by the concealment of critical information i.e. the lack of space for construction/completion of even one bay at the Rasipalayam Substation by the Respondents, the Petitioner has been deprived of funds from its lenders and consequently constrained from undertaking any further development to commission the Project.

14.33. The Petitioner, owing to the inactions of the 1st Respondent is facing the risk of being blacklisted and losing credibility with Siemens, owing to the non-commissioning of the Project, after having appointed Siemens, solely due to the Respondents defaults. Similarly, The Petitioner runs the risk of having its credit rating hampered with the Project Lender, after having received sanction of lending facilities and not being able to provide documentary evidence of even the

assurance of a critical component of the Project. The Petitioner may further be liable to pay termination charges/ penalties to the Project Lender and Siemens in light of the non-commissioning of the Project, resulting in the Petitioner reneging on its obligations under the respective contracts with Siemens and the Project Lender. Siemens Gamesa is India's most reputed and leading wind turbine manufacturing and EPC company. The Petitioner has chosen to engage Siemens Gamesa despite the higher cost payable to ensure that the latest technology will be implemented in the project and bring benefit to the State and the Respondents. The Petitioner has time and again demonstrated that it has done everything within its control and commercial prudence to implement the Project in the best manner possible and continues to do so despite the various challenges and obstacles put forth by the Respondents.

14.34. The 1st Respondent has wilfully concealed its inability to provide or confirm the availability of a 230 kV bay at the Rasipalayam Substation for the Petitioner and therefore has not issued a demand note for the amounts payable in respect of the same. To make matters worse, the 1st Respondent has taken no steps to overcome the said inability and provide a solution for the impasse, and has connivingly merely demanded for payments, despite being aware that there no bays to accommodate the Petitioner. Without substation bays to evacuate power, it is not possible for the Petitioner to undertake development and commissioning of the Project.

14.35. The Petitioner has undertaken all such activities to the extent that it was under the Petitioner's control towards the development of the Project. A reference

may be made to the Project Report dated 04.09.2019 filed by the Petitioner before this Commission. Delays that have occurred have been owing to the inactions of the 1st Respondent which have had a domino effect on the development of the Project. In spite of the obstacles faced by the Petitioner, the Petitioner has been able to make substantial progress in developing the Project. It is only upon confirmation of the evacuation bay and provision of said infrastructure can the further development of the project commence in as much as the pooling sub-station, EHV line and bay expansion work, which are dependent on the availability of the evacuation bay. The erection of the wind turbine generators and the unit sub-station, etc must be constructed only upon confirmation of the evacuation facilities. However, the Petitioner is committed towards completion of the Project and will, upon confirmation of the evacuation infrastructure, endeavor to commission the project in an expedient manner. In fact, the Project Lender brought to the Petitioner's notice that the Respondents failed in providing evacuation facilities to the other successful bidder, out of its own volition and efforts, set up interim evacuation facilities and commissioned part of its project. Despite these efforts, the Respondents did not make any timely payment for the power supplied by the said successful bidder. Since the Project Lender was aware of the difficulties and financial burden being faced by the said successful bidder, it resulted in the Project Lender requiring written confirmations from the Respondents about the availability of the evacuation facilities.

14.36. However, since the Respondents did not provide any such assurances despite requests, the Project Lender has not provided the required funds. It is

submitted that until and unless the 1st Respondent provides assurance of adequate evacuation facilities for the Project and further provides a revolving LC as payment security, it will be impossible for the Petitioner to persuade its lenders to provide final sanction or release of funds. The 1st Respondent must provide proper commitment to the Petitioner that it will be able to provide necessary technical feasibilities to construct the required bay. The Respondents are time and again expecting the Petitioner to pump in money and efforts to honour its obligations under the EPA, however are completely overlooking their own obligations and duties. Having not completed its end of the EPA, the 1st Respondent cannot arm-twist the Petitioner into fulfilling only the Petitioner's obligations without the possibility of the Project fructifying.

14.37. The Respondents have averred that the Rasipalayam 400/230-110kV substation is capable of evacuating the power generated from the Petitioner's project. The Petitioner fails to understand how the Respondents can make such tall claims in the absence of availability of any bay, which can be allotted to the Petitioner, which the 1st Respondent was required to do under the provisions of the EPA and the Grid Code. In-fact, it is pertinent to reiterate that bay no. 4, that ought to have been built and handed over to TANTRANSCO itself has not been completed till date. The construction of the 5th bay, has therefore, obviously not commenced yet.

14.38. It is therefore glaringly evident that the 1st Respondent is purposely concocting stories and making bold but false averments to hide its own misdeeds

and inactions. Upon further inspection, it was found that the construction of the 4th bay has come to a standstill owing to the fact that the PGCIL HT line originating from Salem to Udumalpet Green Corridor is very close to the 230 kV bays. It was further found that the take-up tower of the aforementioned 4th bay is within 5 meters of PGCIL's HT line. The said tower, if constructed, will be in gross violation of the provisions of the CEA Regulation 2010 (Safety and Electric supply), more specifically of clause 69, which indicates the minimum clearance in meters between lines crossing each other to be at least 5.49 meters. It therefore logically follows that the construction of the 4th bay, and consequently the 5th bay (to be allotted to the Petitioner) cannot be erected unless and until the PGCIL's HT line is shifted from there.

14.39. Rasipalayam 400/230-110 kV substation cannot accommodate any more bays as it stands today. In the presence of such glaring facts running directly contrary to the averments made by the Respondents, not even a shred of evidence has been placed before this Commission that will effectively demonstrate that the Respondents are capable of providing a bay to the Petitioner at the Rasipalayam substation, neither has any argument been placed before the Commission in this regard. The Respondents have, time and again, cherry-picked on provisions of the EPA and placed naked unsubstantiated statements before the Hon'ble Commission about the Petitioner's failure to abide by the provisions of the EPA, and have shamelessly expected this Commission and the Petitioner to overlook the responsibilities of the Respondents, particularly provision of the evacuation infrastructure which forms an intricate and critical part of the Project.

14.40. Further, till date, no justification has been provided by the Respondent as to why no response was afforded to the Petitioner's letter dated 16.10.2018. Further, the Respondents have opted to stay silent on the contents of the internal communication dated 26.09.2018 wherein it was informed by the Superintending Engineer, General Construction Circle that the bays at the Rasipalayam Substation were completely allotted and that there was no space available to accommodate extra bays.

14.41. In order to cover up their own folly, the Respondents are merely questioning the source of the said communication. It is well settled law that where a document substantially affects the rights of a particular party, the document cannot be disregarded merely because of the source of the said document. The Respondents have neither provided any solution to the conundrum evidently raised by the contents of the said letter, nor denied the veracity of said contents.

14.42. The Petitioner has already obtained financial closure in as much as it had made arrangements to contribute a sum of Rs.406,00,00,000/- (Rupees Four Hundred and Six Crores only) though its promoters and obtained financial arrangement confirmation for a sum of Rs.1,220,00,00,000 (Rupees One Thousand Two Hundred Twenty Crores only) from L&T Infrastructure Finance Company Limited ("**Project Lender**"). As is evident, the Petitioner has received confirmation of financial arrangement from a reputed lender which demonstrates the capability and reputation of the Petitioner. The sole reason for the lender not proceeding at

this time with disbursement of the loan is TANGEDCO who has failed on all counts including in providing payment guarantee, evacuation facility which are crucial for commencement of any project and hence the Petitioner cannot be blamed for delay caused entirely by TANGEDCO.

14.43. The 1st Respondent never established a revolving Letter of Credit which is envisaged under the respective energy purchase agreements and the terms and conditions of the tender placed by the 1st Respondent, the lack of forthcoming payment from the 1st Respondent to the other suppliers of energy has demonstrated that the 1st Respondent has been renegeing in its obligations and there is no assurance that the Petitioner will receive the money due to it if the Project is developed and commissioned.

14.44. The Respondents cannot, under the guise of claiming to be a saviour of public money, seek encashment of the PBG when it is not supportive of serious project developers with substantial experience and expertise such as the Petitioner, as evidenced by the willingness of the Petitioner towards the development of the Project thus far, while also acceding to nearly every unreasonable request/ instruction issued by the 1st Respondent. The 1st Respondent is further attempting to extract a large sum of money from the Petitioner under the pretext of construction of evacuation infrastructure, while knowing fully well that the same is impossible in the present circumstances.

14.45. In order to be able to make such tall claims, the Respondents must provide effective, timely and satisfactory support to wind power generators such as the Petitioner, in order to effectively generate power which will ultimately be beneficial to the general public. Instead of providing any such support, the Respondents place such hindrances and obstacles in the way of serious project developers, which force them to pursue litigations and thereby cause severe loss not only to such petitioners but also to the state exchequer and the general public.

14.46. The Rasipalayam Grid substation and identified the following issues:

- The construction of existing four nos. of 230kV bays allotted to TANGEDCO are yet to be completed.
- PGCIL 400kV line (Salem to Udumalpet) is running very close along with the existing 230kV bays at Rasipalayam GSS.
- One of the existing 230kV bay which is under construction has been delayed for safety reasons, as the said PGCIL line running very close to the 230kV bay.
- There is no required space available for constructing two additional bays of 230kV.
- Even one additional bay cannot be constructed since the 400kV line is running very close to the 230kV Bays.

14.47. The Petitioner is apprehensive of investing its equity due to the above reasons, which may render its entire investment worthless. The Insolvency and Bankruptcy Code, 2016 which has been enacted with the primary intention of

protecting the creditors (secured and unsecured) also provides a chance for revival to defaulting companies by way of a resolution process. The development of the Project involves the engagement of multiple vendors, contractors, third party service providers, etc. In the absence of obtaining credit facilities (which will only be provided upon assurance of evacuation infrastructure, payment security and commitment of timely payments by the 1st Respondent), the Petitioner cannot be forced to take the risk of continuing with the development of the Project. In the event that an application for insolvency is filed by such vendors due to default in making payments by the Petitioner in respect of the Project (which would be a direct consequence of not obtaining timely credit facilities from the Project Lender), and the same is admitted, the entire business operations of the Petitioner, irrespective of whether or not the same is related to the Project, comes to a standstill and therefore the Petitioner will be put to untold hardships.

14.48. It is amply clear that the 1st Respondent is behaving in a high-handed manner, attempting to dodge its statutory and contractual duties. The 1st Respondent is seeking to unjustly enrich itself, much to the prejudice of the Petitioner, by taking advantage of its own wrong-doings. The Respondent has been painting a grossly misleading picture that the Project has come to halt solely due to the Petitioner, when in-fact the same is wholly attributable to the Respondent alone. Despite being aware of the fact that it has not honoured its own obligations, which has been fatal to the development of the Project, the Respondent has refused to extend the commissioning date. This clearly displays the arbitrary and unreasonable manner in which the 1st Respondent is behaving.

14.49. The argument that the commissioning date of the Project is undisputed, and the Petitioner having not commissioned the Project by the commissioning date, the Respondents are entitled to terminate this Agreement and invoke the bank guarantee and levy liquidated damages. This argument is entirely flawed. It is true that the PPA provided for commissioning date and liquidated damages, but the same was subject to the Respondent completing its obligations in a timely manner.

14.50. It is absolutely absurd for the Respondent to shamelessly argue that the commissioning date is not disputed when the Respondent has not honoured its contractual obligations, when in fact the commissioning date is dependent upon certain crucial obligations of the Respondent, one of which being the Respondent providing adequate evacuation infrastructure and another critical aspect being that the Respondents honour their payment and payment security obligations in order for any investor or financial institution to consider this Project to be commercially viable for such investment.

14.51. In light of the 1st Respondent's failure to fulfil its contractual and statutory obligations, the Petitioner is entitled to receive the extension of commissioning of the Project and that the 1st Respondent, in good faith and due to it being the defaulting party, must have granted such extension willingly. The Respondent's unwillingness to do so is clearly against the well-accepted principle of law that a defaulting party cannot take the benefit of its default to unjustly enrich itself, especially against and to the detriment of the non-defaulting party.

14.52. The Petitioner has approached this Commission in good faith and with a genuine intention to complete the Project as contemplated under the PPA, without any hidden motives. The Petitioner apprehends that the Respondents may, maliciously and/or illegally terminate the PPA, which will hinder the Petitioner's capability of completing the Project and has therefore filed the present petition.

14.53. The Petitioner approached the Respondents, based upon the direction of this Commission to arrive at an amicable settlement. Subsequent to the execution of the PPA for the Petitioner's project, there has been a significant increase in the equipment costs owing to limited OEM suppliers available in the industry currently. Additionally, there has been a further substantial increase in the costs of procuring land. Consequently, the costs of carrying out the Project has drastically increased. Despite the various hurdles and challenges faced for executing this Project, the Petitioner is willing to execute the Project for a reduced tariff rate as opposed to the earlier agreed rate.

14.54. The Petitioner offered a reduction in the tariff rate as well as a reduction in the total capacity of the Project, which would nevertheless ensure delivery of the entire power contemplated under the Project, which would however cause significant losses to the Petitioner. In-turn, by accepting the proposal put forth by the Petitioner, the 1st Respondent will not only receive the entire quantum of power -originally agreed by the Petitioner and 1st Respondent but will also save a sum of Indian Rupees One Hundred and Fifty Crores. This in-turn will save the State

Exchequer and the general public a heavy sum. The Petitioner, as directed by this Commission, also made sincere efforts to explain the issues faced by the Petitioner because of the non-availability of evacuation infrastructure and met the higher officials of TANGEDCO, TANTRANSCO, NCES and made proposals by reducing the tariff rates, which proposal also has been filed before this Commission. However, there were no reasonable consideration for all the efforts taken by the Petitioner till date by the Respondents.

14.55. The Respondents have heavily relied on a passing remark made in the order of this Commission in M.P. 42 of 2008, as the rationale for denying extension of time for completion of the Project, stating that this Commission *has taken cognizance of the fact that wind energy generators require just three to six months to install their capacity*. The Respondents have tried to use the remark made by this Commission in respect of individual wind energy generator (WEG), as also chosen to be ignorant of the fact that wind energy projects comprising of multiple WEGs in and around the year 2008 were comprised of capacity between 25 MW to 50 MW. The Respondents know fully well that they cannot apply such timelines to large projects such as the current Project which comprises of 250 MW capacity and also uses substantially larger turbines having blade length of over 80 metres which are neither readily available nor easily transportable.

14.56. These projects take anywhere between 18 to 36 months depending on financial closure, manufacturing, land procurement, land approvals, TANGEDCO and AAI/MOD approvals, route preparation, road widening, road strengthening, bell

mouth creation for turning, transportation, foundation curing period of 42 days each, erection, safety certification, short term and long term stability tests and finally commissioning, combined with integration of pooling substation with grid substation and laying off dozens of kilometres of internal and external medium voltage and high voltage lines respectively. Even SECI allows between 24 to 36 months for commissioning of such projects. The arguments of the Respondents relying on an order pertaining to circumstances existing 12 years ago where abundant land and evacuation facility were available falls flat on its face. The Respondents are further selectively reading the order in M.P. 42 of 2008 without recognizing the obligations cast upon them to efficiently and timely provide evacuation facilities for wind power projects and to ensure prompt settlement of accounts given the seasonal nature of wind power production. Therefore, the order in M.P. 42 of 2008 has no application on this matter *per se*.

14.57. All indulgences shown by the Respondent towards the Petitioner were with ulterior motives pursuant to several difficulties and constraints being faced by the Respondents as well. The Respondents are further trying albeit poorly to show a public cause in their seeking to encash the PBG.

14.58. At a time where the State of Tamil Nadu requiring power, it would be prudent for any state utility to try to arrive at an amicable situation. However, Respondents are ill-advised to act in a high-handed, arbitrary and wholly whimsical manner and thereby refusing to accept their obligations under the RfS, EPA and the Grid Code or budge from their stance and guise to indulge in constructive

settlement talks and thereafter for the Counsel for the Respondents to refute/deny the entire positive outcome of such settlement talks.

14.59. This Commission must take into consideration the internal communication dated 26.09.2018 to ascertain the reason for the non-commissioning of the Project till date. The Commission may appoint an advocate commissioner or a technical expert to visit the Rasipalayam Substation to verify the statements being made by the Petitioner and the Respondents pertaining to the availability/possibility of provision of evacuation infrastructure. The entire dispute will become clear once the Respondents provide an acceptable explanation to the said letter dated 26.09.2018. Irrespective of whether the said bay is available as of this date, the crux of the dispute lies in the fact that the bay was not assured as and when it had to be, owing to the fact that it was not available on the date of the Respondent's letter dated 09.01.2019.

14.60. The Respondents are in no way interested in carrying forward the Project but are only interested in encashing the PBG, after making false assurances and promises to the Petitioner and failing to deliver on the same. After blatant and severe lapses in completion of its own end of the PPA, the Respondents have been continuously attempting to encash the PBG in some manner or the other, thereby unjustly enriching themselves of the PBG amount while also being entirely at fault and the sole defaulting party for the failure of the Project. The Respondents have only been floating tenders with the intention of short-changing private players such as the Petitioner, with a view to encash the PBG wilfully, in light of the fact that they

are in a dominant position, leaving the private players with little to no room to survive. The process of floating tenders, more particularly this tender, is a sham, and is done for extorting monies out of the Petitioner and other wind power generators.

14.61. The Petitioner approached the 1st Respondent requesting them to issue a demand note in favour of the Petitioner in order to enable them to make payments towards the bay cost. There has been no response to the letter till date, neither has there been any confirmation pertaining to the bay allocation, despite the lapse of more than 2 years from the date of signing of the PPA. Without the confirmation of the bay availability itself, and consequently, the evacuation facility, which is one of the most critical obligations of the Respondents the Respondents are attempting to evade all liabilities and are proceeding on the footing that the Petitioner has not been committed to completion of the project. The Project Report filed by the Petitioner sets out in detail, with documentary evidence the various steps taken by the Petitioner towards completion of the Project.

14.62. The Petitioner has developed the Project so far as it was possible, however several critical and integral parts of the Project remain to be completed, which can be completed only pursuant to the availability of the evacuation facilities and assurance of payment security leading to financial closure and disbursement. Upon receipt of the confirmation of permanent evacuation facilities, the Project Lender will provide financial closure and permit drawdown, pursuant to which, the remainder of the Project will be undertaken. In light of the above, it was originally

proposed that the Petitioner will require eighteen months to complete the Project after the date of evacuation facilities being confirmed and payment security being provided to the Petitioner.

14.63. However, in light of the Covid-19 pandemic outbreak and the resultant lockdown, industries across the country have been experiencing shortage of resources and import have been brought to a standstill. Orders placed to suppliers have been notified to be delayed by several months due to manufacturing backlog around the world. All contract labourers (including migrant labourers) from various part of the country have been displaced and restoration of labour for infrastructure projects will require some months. Hence, it is evident that there will be substantial delays in mobilizing resources, logistics and/or sourcing components required for manufacturing WTGs from other countries, due to the Central Government imposed embargo on imports. Therefore, a 6 months' moratorium may be granted for the manufacturing and mobilization activities to recommence and thereafter an extension of thirty months to complete the Project from the date of evacuation facilities being confirmed to the Petitioner.

14.64. The Petitioner has always endeavored and placed its best efforts to commission the Project and supply the electricity as agreed upon. However, the lackadaisical and high-handed nature of the Respondents appear to indicate that the Respondents are not willing to or interested in the development or completion of the Project, rather merely interested in the encashment of the PBG. In the event that this Hon'ble Commission be of the view that the Project is not viable to be

completed any longer due to the delays as can be seen from the above to not be attributable to the Petitioner, TANGEDCO may be directed to terminate the PPA upon the following terms:

1. The Respondents be liable to be reimburse the Petitioner towards all expenses and payments made by the Petitioner for the development and completion of the Project along with interest at the rate of 12% p.a.; and
2. The Petitioner should be entitled to cancel the PBG valid upto 20.10.2019 and renewed upto 20.10.2021 furnished to the 1st Respondent; and
3. The Respondents shall not be entitled to raise any claims against the Petitioner with respect to the time elapsed, termination of the PPA and/or the Project.

14.65. The application filed by the Petitioner regarding the refund of the court fee paid (Rs.25,00,000/-) may also be considered in the interest of justice which were paid under protest by the Petitioner at the time of filing the DRP. The appropriate court fee for the matter was already paid along with filing the application. Item No. 6(c) of the Regulations prescribes the fee for filing any interlocutory application in any main petition filed before the Commission to be INR 500 (Indian National Rupees Five Hundred Only) for each interlocutory application filed. Item No.7-A in section 6 of the Regulations prescribes the fee for adjudication of disputes between the licensees and generating companies under Section 86(1)(f) of the Electricity Act to be 1% of the amount in dispute subject to a minimum of Rs.20,000/-.

14.66. The Registry treated the value of the dispute to be the value of the performance bank guarantee furnished by the Petitioner. However, the crux of the dispute is not the encashment of performance bank guarantee, much less the quantum of the bank guarantee and therefore, the Registry is not entitled to calculate the court fee based on the value of the Bank Guarantee. The claim for a relief against the performance guarantee is only an ancillary relief to the main relief and therefore, and payment of court fee on such ancillary relief is not warranted. The court fee levied upon the Petitioner, to the tune of Rs.25,00,000/- (Rupees TwentyFive Lakhs Only) is excessive and incorrect and ought to be returned/refunded to the Petitioner.

15. Memo filed by the petitioner for settlement:-

In the Memo filed on 25-02-2020, the counsel for the petitioner submitted a proposal for settlement which contains the following:-

15.1. The Commission directed the petitioner and respondents to file their respective status reports pertaining to the project in dispute. Consequently, the petitioner and respondents filed their respective status reports and the matter was heard in detail. Upon hearing the petitioner and respondent extensively, the Commission reserved orders in the said I.A. No.5 of 2019 on 15-10-2019 and observed that the matter is one that can be settled and urged the petitioner and respondents to explore the possibility of amicable settlement by mutual good faith discussions.

15.2. Based on the Commission's advice and direction, and in good faith, the petitioner and respondents had multiple rounds of discussions and negotiations and the parties have agreed to settle the matter amicably, in the interest of implementing the project without any further delay and to take care of the larger public good that will arise from generation of energy from renewable sources.

15.3. The petitioner is willing to execute the project for a reduced tariff rate of Rs.3.32 per unit as opposed to the earlier agreed rate of Rs.3.42 per unit subject to the following terms:-

- (a) The petitioner is willing to commission the project at a reduced capacity of 200 MW from the earlier agreed 250 MW under the EPA with higher CUF in order to supply the same quantum of energy to TANGEDCO approximately 59.57 crores units per annum on an average.
- (b) TANGEDCO be required to provide the petitioner with 1 (one) exclusive bay out of the presently available 4 (four) numbers of 230/400 kV bays in Rasipalayam 400 kV sub-station for the entire life of the project without any interference by the respondents or TANTRANSCO. With the revised project capacity of 200 MW, TANTRANSCO / TANGEDCO will be able to use the remaining available bays for own use by TANTRANSCO / TANGEDCO.
- (c) The reduced tariff of Rs.3.32 per unit shall not be further reduced at any point in time and shall be applicable uniformly for all the units supplied

by the Petitioner till the lifetime of the Project, without any limitations or higher CUF that may result from the Project.

- (d) TANGEDCO shall furnish a monthly revolving Letter of Credit as per the current guidelines issued by Ministry of Power dated 28.06.2019 for an estimated value of the bill for one month. In any case TANGEDCO shall strictly adhere to the EPA and the Addendum to the Energy Purchase Agreement dated 04.12.2017 ("Amended EPA") with regard to the Payment terms.
- (e) The Petitioner be granted 18 (eighteen) months for achieving the commissioning (as required under clause 16(b) of the EPA and clause 4 of the Amended EPA) from the date of execution of the newly amended Energy Purchase Agreement pursuant hereto and allocation of bay at the Rasipalayam 400 kV sub-station for the commissioning of the Project.
- (f) The Performance Bank Guarantee provided by the Petitioner in 0753617BG00000139 for a sum of Rs.25,00,00,000/- (Rupees TwentyFive Crores Only) as extended on 14.10.2019, be kept valid for a sum of Rs.20,00,00,000/- (Rupees Twenty Crores Only) corresponding to the revised Project capacity of 200 MW until the completion of the Project and reduced proportionately with the commissioning of each part of the Project.
- (g) Rest of the terms of EPA and the Amended EPA that are not amended by the above proposals shall continue in force.

15.4. Based on the proposal of the Petitioner for a reduction of 10 Paise on the originally proposed tariff rate of Rs.3.42 per unit, TANGEDCO will be saving an estimated substantial sum of about Rs.150,00,00,000/- (Rupees One Hundred and Fifty Crores Only) for the EPA period of 25 (twenty five) years.

15.5. When the Commission called upon the counsel for the respondent for his response to the above proposal submitted by the petitioner, the counsel has sought to place on record that no agreement has been reached within the petitioner and TANGEDCO on the price of energy which according to him is very high and further due to lack of agreement between the parties on price of energy and other commercial terms further arguments are required in the matter. However, no further submissions were made on the respondent side the final hearing of the matter.

16. Findings of the Commission:-

16.1 Before proceeding to deliver our findings on the issues raised by the petitioner herein, it is necessary to place on record that the Hon'ble Chairman of the Commission has sought to recuse himself from this matter and accordingly the Commission in its Daily Order dated 05-09-2019 has held that the Hon'ble Chairman recused himself from hearing in future. In this regard, it is to be noted that as per Regulation 12 of the Conduct of Business Regulations of the Commission, the presence of two Members is sufficient to constitute the Quorum and accordingly we proceed with the present case excluding the Hon'ble Chairperson of the Commission for the reasons stated by him. It is necessary to

set out the brief history of the events leading to the filing of this petition for better appreciation of the fact of the case.

16.2. The petition has been filed to direct the respondent (TANGEDCO) to provide the evacuation facility / infrastructure under the provisions of EPA dated 16-10-2017 and/or request for submission document bearing reference CE/NCES/O.T.No.2/2017-18 and / or in its response to the pre-bid queries raised by the prospective bidders and consequently extend the commissioning date of the project for the period of delay caused by the 1st Respondent until completion of the same in providing evacuation facility to the petitioner. The petitioner has also filed an interim application in I.A.No.5 of 2019 in the above D.R.P. to grant an order of interim injunction restraining the respondent, its men, agents as affiliates from invoking and / or encashing the Performance Bank Guarantee dated 12-10-2017 for an amount of the 25,00,00,000/- (Rupees Twenty Five Crores only) and from levying the liquidated damages under clause 16 (b) of the said EPA dated 16-10-2017.

16.3. The petitioner and the 1st Respondent executed an EPA on 16-10-2017 for establishment of 250 MW Wind Power Project at Parivillikotai Village, Ottapidaram, T.K., Tuticorin District. Subsequently the location of the project has been changed to Koothampoondi area, Ottanchatram Taluk, Dindigul District due to constraints in purchase of land and right of way issues. On 12-10-2017, the petitioner has executed a Performance Bank Guarantee for Rs.25 crores at the rate of Rs.10 lakhs per MW. It is a security against commissioning of the project. The project

was to commission on 15-01-2019 i.e. within 15 months from the date of signing of the EPA. The salient features of the Performance Guarantee are as follows:-

- (i) If the project is delayed beyond 5 months, the 1st Respondent may encash the PBG on per day basis proportionate to the capacity not commissioned.
- (ii) If the project is delayed beyond 5 months thereafter, 1st Respondent is entitled to encash 100% of the PBG.

16.4. As per the contractual terms, the liquidated damages for the delayed commissioning of the project is Rs.10,000/- (Rupees Ten Thousand only) per day per MW for the remaining capacity which is not commissioned. As per clause 16 (b) of the EPA, the maximum period allowed for commissioning of the full capacity of the project with encashment of PBG and payment of liquidated damages is 10 months from the scheduled date of commissioning i.e. 15-11-2019. If the project is not commissioned beyond 10 months, 6 months scheduled date of commissioning, the EPA will be terminated.

16.5. It is an admitted fact by the petitioner that since the project site has been changed there was a delay in submitting the land documents by the petitioner and the Respondent has also permitted the same till 31-05-2018. However, the 1st Respondent declined the request of the petitioner to change the power transformer system with two 125 MVA transformers instead of two 10 MVA and one 50 MVA transformers for establishing Pooling Substation. It is also an admitted fact by the petitioner that there was issues in finalising the pooling substation and faced delays

in finalising and registering land for pooling substation. It has also been admitted by the petitioner that respondent vide its letter dated 25-11-2017 informed that load flow tests were completed and that project can be interfaced with 400/230-110 KV substation at Rasipalayam. Before interfacing with the substation, the petitioner has to build a pooling substation to receive the power generated by the WEGs by way of the 33 KV lines which would then be evacuated through the 230 KV lines to the Rasipalayam 400 KV substation built and owned by the 1st Respondent. It is therefore clear that on the part of the petitioner, there is an obligation to build Pooling Substation and there is a corresponding obligation on the part of the Respondent to build Rasipalayam 400 KV substation to evacuate the power.

16.6. On 18-09-2018, the 1st Respondent communicated a letter to the petitioner requesting to deposit Rs.6,74,29,800/- as tentative bay cost within 30 days from the date of the said communication or in the alternative, the petitioner may choose to construct the bays at its own by paying the supervision of charge of Rs.1,86,00,000/- per day to the 1st Respondent. In his reply dated 25-09-2018, the petitioner has informed that though they have finalized the OEM Vendor, identified the land for Pooling Sub-station and WTG locations, attained the financial closure etc. there was the way leave problem faced in erecting the 230 KV EHT lines connecting the pooling stations to the Rasipalayam 400 KV SS and Pooling Sub-station has to be relocated. Further, the petitioner has not paid any amount as aforesaid but alleged that it did not receive any demand notice for final cost for establishing the bay to assure itself that there is no space available at Rasipuram substation.

16.7. Based on the Commission's daily order dated 09-08-2019, the Respondent, TANGEDCO has filed a Project Report wherein it has specifically averred that the Rasipuram 400/230-110 KV SS is sanctioned by its Board vide BP No.59, dated 03-12-2012 at a cost of Rs.630.46 crores and it has a capacity of 900 MW. It is also averred therein that it has 4 Nos. 230 KV bay and 5 Nos. 110 KV bays and commissioned on 31-08-2017. The respondent has averred that the petitioner has not even paid the charges for the bay. It is the specific contention of the respondent that at no point of time during the tenure of the PPA, TANEDCO has denied evacuation or communicated its inability to provide evacuation. It is stated by the Respondent that the petitioner has not even laid a brick in place. The Respondent has submitted photographs as a proof to that averment.

16.8. On the other hand, the petitioner in the affidavit dated 16-09-2019 submitted that the construction of the 4th Bay has come to a standstill owing to the fact that the PGCIL line from Salem to Udumalpet Green Corridor is very close to 230 KV Bay and that the take up tower of the 4th Bay is within the 5 metres of PGCIL, high tension live and if constructed will be in gross violation of the provisions of Central Electricity Authority (CEA) Regulations, 2010 (Safety and Electric Supply). He has also enclosed photographs taken at the project site evidencing the proximity of the PGCIL line and the take up tower of 4th Bay. They have disputed the contention of the Respondent that the Rasipalayam sub-station was commissioned on 31-08-2017 citing a communication to the petitioner dated 25-11-2017 wherein it was mentioned that petitioner proposed 230/33 KV 10 (1) substation at the

Koothampondi Village with 2 x 100 + 1x 50 MVA power transformer is feasible for being connected to the Rasipalayam Substation only after commissioning of the Rasipalayam 400 KV SS by TANGEDCO.

16.9. They have further submitted that the erection of the pooling substation was not undertaken due to lack of clarity on the station of evacuation facilities being made available to the petitioner which the respondent is obligated to provide statutorily under section 2.8 of CERC (Indian Electricity Grid Code) Regulations and contractually under section 2 (d) of the EPA according to which both parties shall comply with the provisions contained in the Indian Electricity Grid Code, Tamil Nadu Electricity Grid Code, the Electricity Act, 2003, other codes and regulations issued by TNERC / CEA as amended from time to time.

16.10. We heard the parties. On a careful consideration of the submissions of the petitioner and the respondent, we find that the following issues raised for considerations, namely-

(1) Whether the terms of the PPA provided for liquidated damages for non-commissioning of the project in time?

In order to settle the issue, it is necessary to refer to clause 16 (b) of the EPA which deals with the liquidated damages to be paid by the petitioner in case of non-commissioning of the project within the period stipulated in the EPA. The EPA dated 16-10-2017 entered into between the parties clearly provides that liquidated damages are payable in the case of failure on the part of the petitioner

to commission the project within the time limit set out therein. Similarly, the PPA also provides for encashment of the Bank Guarantee in Clause 16(b). Hence, we are satisfied that the PPA provides for encashment of Bank Guarantee and levy of liquidated damages and now it remains to be seen only as to whether the said clauses can be invoked by TANGEDCO in the light of the opposition to the same from the petitioner's side for the reasons relied upon by the petitioner and in view of clause 2 (b) (d) of the EPA.

(2) Whether the delay in commissioning the project is attributable to the TANGEDCO as alleged by the petitioner?

(i) It is the stand of the petitioner throughout the proceedings that the commissioning of bay for interfacing with the 400 KV sub-station of the respondent at Rasipalayam was never ready and that was the reason why the project could not be commissioned within the time limit. Per contra, the respondent stoutly denied the same and blamed the petitioner for the delay in commissioning of the project. In fact, the Respondent TANGEDCO had taken a stand that the petitioner was given two options, namely, either to establish the required Bay at its own cost or pay the tentative establishment and supervision charges amounting to Rs.186 lakhs and that the petitioner did not pay the charges for the Bay and is now attempting to mislead the Commission. In view of the same, the moot point which arises for consideration is whether in fact there was a Bay at all which was ready and it was only due to the default on the part of the petitioner to pay the required amount that the project could not be commissioned in time. It

is seen from the Written Submissions filed on behalf of the petitioner that the respondent allegedly concealed its inability to provide or confirm the availability of 230 KV Bay at Rasipalayam sub-station and the same can be evidenced from the fact that no demand note for the amount payable was raised. The petitioner has also made averments to the effect that in view of the respondents' act in not arranging the evacuation, the lenders did not provide the required funds leading to non-commissioning of the project.

(ii) To put it otherwise, it is the case of the petitioner that the respondents are requiring the petitioner to commission 230/33 KV sub-station on the basis of a non-existent Bay and if commissioning of the plant is done based on the same the petitioner would incur heavy loss. Having considered arguments of both sides, we find that the action of TANGEDCO in not raising a demand note for the amount to be paid by the petitioner towards the cost of the Bay is inscrutable.

(iii) We find no reason as to why a demand note could not be raised by TANGEDCO if the Bay was ready. It is also seen from the page 163 of the typed set containing letter dated 26-09-2018 from the SE General Construction Circle, Coimbatore to SE Operation Coimbatore informing that 400/230 KV – 110 KV Rasipalayam AIS has 4 Nos. 230 KV Bays while are being utilised by TANTRANSCO and further there is no additional space available for accommodating 2 Nos, 230 KV Bays and requested necessary action to be taken. A copy of the letter was marked to Director (Transmission) Projects / Chennai. However, no material was placed before us by the respondent to show that the

Director (Transmission / Project has not agreed with the contentions of SE at the field or assured the SE that the apprehension of the SE will be allayed and additional space will be made available.

(iv) In such circumstances, there is a probability that the bay was not ready but from the material records, we are unable to come to a definite conclusion on this score. However, given the fact that TANGEDCO did not raise any demand notice as alleged by the petitioner, we find that the arguments of the petitioner, that there was hesitation on the part of the investors to lend money in the absence of a firm commitment with regard to the commissioning of bay is convincing. However, this is not to suggest that the fault is entirely on TANGEDCO. We have to necessarily observe that petitioner is also equally responsible for the delay in the commissioning of the project as we have observed from the material records that the petitioner too has to share the blame for non-commissioning of the project in time as the evidence produced by him in the form of land sale deeds, land lease deeds. OEM's letter dated 08-02-2018 regarding the project progress are not sufficient evidence to the effect that the project was ready for commissioning from his side and it was only TANGEDCO which was to be responsible for not granting evacuation in time to satisfy the lenders L & T financial services who insisted on the status of provision of 400 KVA connecting Bay to be undertaken by TANGEDCO for evacuation of electricity which is one of the pre-disbursement conditions. We find that both parties jointly could have issued a letter of categorical assurance / comfort to the lenders to expedite the project progress in accordance with clause 2 (b) and (d) of EPA. Not only that, frequent extensions

for commissioning of the project were sought for by the petitioner and acceded to by the respondent. In view of the above, we find the delay is attributable to both the parties.

3. Whether the Commission can extend the commissioning of the project?

(i) The Hon'ble Supreme Court in Gujarat UrjaVikas Nigam Ltd. Vs. Solar Semi Conductor Power Company (India) Pvt. Ltd. and others in Civil Appeal No. 63999 of 2016 has held as follows:-

“The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser, viz., the respondent No.1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission.”

(ii) The above decision will equally apply to the case on hand. When a time limit is prescribed in the EPA for commissioning of the project, the Commission has no power to extend such time limit. The Commission could only examine the rights and liabilities of the parties within the frame work of the contract i.e. EPA and can grant relief to the affected parties only as per the provisions contained in the EPA. It is to be observed here that the Hon'ble Supreme Court was categorical on the point that the control period cannot be extended by exercise of inherent powers and

such an exercise of power can be done only with reference to the specific powers conferred by the Act or a Regulation. Needless to say that if at all an extension is to be granted it can be done only by invocation of inherent powers of the Commission as there is no provision for extension of time limit in the PPA entered between the parties. As the ratio laid down by the Hon'ble Apex Court has deprecated the extension of control period by exercise of inherent powers, the Commission cannot invoke its inherent powers conferred in the Regulations. Also it may be noted that the extension of control period and the extension of date of commissioning of a project, albeit, factually stand on the different footing, the principle with regard to the extension in both the cases, in our view cannot be differentiated and stand on the same footing. It is so because, the extension of a project, as per the Apex Court verdict cannot be done in project specific cases in the absence of express statutory provisions. In view of the same, we cannot agree to the plea of the petitioner direct the Respondents to extend the commissioning of the project.

4. Whether the question of force majeure would come to rescue of the petitioner?

The answer to the above question, in our view, would be a firm 'No' for the reason that the basic requirement of 15 days notice as contemplated in clause 17 of the PPA has not been complied with. Hence, the project cannot be declared to be frustrated on account of force majeure and the liability of the petitioner to comply with the terms of the PPA cannot be discharged.

5. Whether the Commission has powers to require the parties to re-negotiate the terms of the contract?

(i) Having said that the blame lies on both sides for not commissioning the project in time, we would like to add at the same time that the project being a renewable one and in view of the thrust and stimulus given to the renewable sources by the Government of India and Government of Tamil Nadu, we cannot direct the closing down of the project without examining the alternative options. If we are to go strictly by the terms of the PPA, the resultant consequence should be either to enforce the terms of the PPA by ordering the payment of liquidated damages or set aside the same in case of justification for the same. However, as such supra, we find that both sides are at fault for the delay in the project.

(ii) The most notable point which requires consideration is that the respondent has, on its own granted extensions several times to the petitioner thereby changing terms of the contract which has been entered into with the petitioner. It is noteworthy to mention here that extension of time limit under PPA can be done only with the approval of the Commission as per Clause 7.1 of the guidelines for competitive bidding. However, we find that the respondent kept on extending the same on its own so as to enable the petitioner to complete the project in time. Having changed the terms of the PPA, by granting extension, the respondent cannot seek to place itself in the same position as it was before hence, the respondent too has to be blamed for the delay in commissioning of the project. Apart from this we have to necessarily state here that as a Regulator, the Commission cannot view the EPA as an agreement simplicitor. The EPA is a

statutory contract unlike an ordinary which falls within the realm of Indian Contracts Act.

(iii) The EPA being special contract having recognition and sanction under the Electricity Act and having the object of promotion of non-conventional sources, it cannot be discarded without detailed examination. It is needless to say that the Government of India, at present has embarked upon and an ambition target of 175 GW of generation of non-conventional power by the year 2022 and the Commission being a Regulator cannot ignore the objectives of Government of India in taking a decision in this matter. It is quiet easy to render a finding to the effect that the contract between the two sides got frustrated due to the inability of either side to comply with the terms of the PPA. But in our view, that cannot be the solution in the present case as it does not serve any real cause. The object of the regulatory regime in terms of the Electricity Act is to promote non-conventional sources under section 86 (1) (e) of the Act and earnest effort is required to be made to achieve it. Therefore we deem it fit an appropriate to state here that every effort must be made to promote the non-conventional source and in line with the same, the present project must be given a further try to see whether it can resuscitated, moreso, when the power from the project would be green in nature and aid the reduction in pollution of atmosphere. Viewed in the said backdrop, we find that the petitioner has filed a Memo dated 25-02-2020 to the effect that it is agreeable to sell power at a reduced rate of Rs.3.32 per -unit if the TANGEDCO is agreeable to the same. The outcome was not placed before the Commission. In such circumstances,- it is necessary to see whether the EPA can be re-negotiated. In this connection, we

have considered the provisions of the National Tariff Policy, 2016, the relevant portion of which are extracted below:-

“1.3. It is therefore essential to attract adequate investments in the power sector by providing appropriate return on investment as budgetary resources of the Central and State Governments are incapable of providing the requisite funds. It is equally necessary to ensure availability of electricity to different categories of consumers at reasonable rates for achieving the objectives of rapid economic development of the country and improvement in the living standards of the people.

1.4. Balancing the requirement of attracting adequate investments to the sector and that of ensuring reasonability of user charges for the consumers is the critical challenge for the regulatory process. Accelerated development of the power sector and its ability to attract necessary investments calls for, inter alia, consistent regulatory approach across the country. Consistency in approach becomes all the more necessary considering the large number of States and the diversities involved.

5.2. All future requirement of power should be procured competitively by distribution licensees except in case of expansion of existing projects or where there is a State controlled / owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.

6.0. Accelerated growth of the generation capacity sector is essential to meet the estimated growth in demand. Adequacy of generation is also essential for efficient functioning of power markets. At the same time, it is to be ensured that new capacity addition should deliver electricity at most efficient rates to protect the interests of consumers. This policy stipulates the following for meeting these objectives.

6.1. Procurement of power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a distribution licensee for purchase of energy from renewable energy sources, taking into account availability of such resources and its impact on retail tariffs. Cost of purchase of renewable energy shall be taken into account while determining tariff by SERCs. Long term growth trajectory of Renewable Purchase Obligations (RPOs) will be prescribed by the Ministry of Power in consultation with MNRE.”

(iv) It may be seen from the above that thrust is on promotion of non-conventional sources of supply of electricity to different categories of the consumers at reasonable rates. The requirement of peak hour load requirements, renewable purchase obligation, necessity to increase the renewable capacity are also the facts which are required to be borne in mind and hence, we are of the view that as a Regulator, the Commission has the power to order re-negotiation of the EPA in the overall promotion of the renewable power.

6. Whether the petitioner is entitled to any relief, and if no, to what extent?

(i) As stated above, no reason has been stated as to why a demand note was not raised if the Bay had already been commissioned for the purpose of evacuation. At the same time, we do not fully subscribe to the stand of the petitioner that TANGEDCO was seeking the petitioner to invest and pay money on an non-existent Bay.

(ii) Though it has been clearly mentioned in clause 2 (b) of EPA that the WPG and Distribution Licensee /State Transmission Utility shall comply with the provisions contained in the Commission's Intrastate Open Access Regulations,

2014 and CEA Technical Standards for Connectivity to the Grid Regulations, 2007

for grid connectivity which includes the following:-

- (i) Connection agreement
- (ii) Site responsibility schedule
- (iii) Access at connection site
- (iv) Site common drawings
- (v) Safety
- (vi) Protection system and coordination
- (vii) Inspection, Test, Calibration and Maintenance prior to connection.

(iii) We find there was no proper coordination of both the parties to expedite the project progress. Instead they were pointing out the shortcomings of each side. The Hon'ble APTEL in Appeal No. 319 of 2019 and I.A. No.1564 of 2019, 1566 of 2019 and 1915 of 2019 has outlined the importance of parallel progress and ruled that "both sides were obliged to make parallel progress and procurer could not be conceived to be vested with the authority to hold that other side in default without first notifying the discharge of the obligation on its part. This is a situation wherein the invocation of the Bank Guarantee and subsequent termination must be held to be bad in law" (Para 37 of the judgment)

(iv) However, only for the sake of promotion of Non-conventional Energy Sources which requires impetus and for the reasons stated in the National Tariff Policy, we are inclined to give the commissioning of the projects another chance. In this connection, the responsibility of the State Commission for facilitating the attainment of development of power sector which has been set out in the National Electricity Policy also requires special mention. The relevant portions of the said policy are re-produced below;

“6.1 Electricity being a concurrent subject, a well-coordinated approach would be necessary for development of the power sector. This is essential for the attainment of the objective of providing electricity-access to all households in next five years and providing reliable uninterrupted quality power supply to all consumers. The State Governments have a major role, particularly in creation of generation capacity, state level transmission and distribution. The Central Government would assist the States in the attainment of this objective. It would be playing a supportive role in fresh capacity addition and a major role in development of the National Grid. The State Governments need to ensure the success of reforms and restoration of financial health in distribution, which alone can enable the creation of requisite generation capacity. The Regulatory Commissions have the responsibility of ensuring that the regulatory processes facilitate the attainment of this objective. They also have a developmental role whose fulfillment would need a less formal and a consultative process”.

(ii) In view of the forgoing discussions, the following directions are given:-

(a) The commissioning of the project can be given another try to see the sincerity of the parties in carrying out the completion of the project. The outcome of the proposal dated 25-02-2020 be placed before the Commission. The parties shall re-negotiate the PPA and file a fresh PPA as both sides are at fault in regard to the adherence to the terms of the PPA under question. The decision on the same shall be filed within one month from the date of this order.

(b) In the event of failure on the part of the petitioner and the respondent to arrive at a mutual understanding on the re-negotiation of the terms and conditions of the PPA dated 16.10.2017, and in view of the fact that both sides are at fault in

regard to the adherence to the terms of PPA under question as discussed above and in the light of the findings of Hon'ble APTEL, we order that the Respondent is restrained from invoking the Performance Bank Guarantee and the Respondent should return the same to the petitioner. There shall be no further financial liabilities to both the parties and both the parties are discharged from respective obligations of them as per EPA.

(c) As regards the refund sought for by the petitioner in regard to the court fee to an extent of Rs.25,00,000/-, it is observed that the amount of Performance Bank Guarantee (PBG) falls within the meaning of "amount in dispute" as occurring in Regulation 6(7A) of the TNERC-Fees & Fines Regulations, 2004 and hence the Registry was right in insisting on the same. Hence, the refund cannot be allowed. Accordingly, I.A.No.3 of 2019 filed by the petitioner is dismissed.

With the above orders, I.A.Nos.3 and 5 of 2019 and the main D.R.P.No.6 of 2019 is disposed of.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(Dr.T.Prabhakara Rao)
Member

//True Copy//

Secretary
Tamil Nadu Electricity
Regulatory Commission